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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOAZ AVITZUR,

Petitioner,

v.

SUSAN ROE AVITZUR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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May 1983

QUESTION PRESENTED

Whether the First and Fourteenth Amendments prohibit a civil court from adjudicating the complaint of an ex-wife who is seeking an order to compel her former husband to submit to the jurisdiction of an ecclesiastical court and participate in a religious proceeding.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No. 82 -

BOAZ AVITZUR,
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v.

SUSAN ROE AVITZUR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Boaz Avitzur petitions that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York which reinstated the respondent's complaint for injunctive relief to

compel petitioner to appear before a Jewish religious court for the purpose of a religious determination of their marital status.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of the State of New York (App. A, A1-A14) is reported at 58 N.Y.2d 108. The opinion of the New York State Supreme Court, Appellate Division, Third Department (App. B, B1-B5) is reported at 86 A.D.2d 133. The opinion of the New York State Supreme Court, Special Term (App. C, C1-C8) is not reported.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on February 15, 1983 (A1). The petition is

being filed within ninety days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment provides, in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves an attempt to obtain a civil court order requiring a party to appear before a religious tribunal for a purely religious purpose.

1. Petitioner and respondent were married by a rabbi on May 22, 1966 in a conservative Jewish religious ceremony (A4).

As part of the ceremony, the parties signed both an Aramic and an English language version of a religious document called a "Ketubah" (App. E), which set forth various mutual promises of the parties to "live in accordance with the Jewish law of marriage throughout [their]

lifetime". For example, the petitioner promised to cherish and provide for his wife as "required to do by our religious law and tradition" (E1), and the respondent agreed to take on the responsibilities of a Jewish wife "as Jewish law and tradition prescribe" (Id.). The parties further agreed as follows:

> . . . As evidence of our desire to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom . . . hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the

> party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

(E2-E3).

On May 16, 1978, petitioner was granted a civil "fault" divorce upon the ground of cruel and inhuman treatment. The divorce decree makes no reference to a religious divorce or an agreement to submit to a religious tribunal for the purpose of obtaining a religious divorce.

After petitioner was granted the civil divorce, respondent attempted to summon the petitioner to appear before the Beth Din of the Rabbinical Assembly and the Jewish Theological Assembly of

America, for the purpose of obtaining a Jewish divorce decree, known as a "Get". The appearance of both parties to a marriage before the Beth Din is a pre-requisite to the issuance by that body of a Get. Petitioner declined to appear before the Beth Din.

2. Respondent then filed a civil complaint (App. D) against petitioner in New York State Supreme Court, Albany County, setting forth the above facts and further alleging that "[p]ursuant to the terms of the Ketubah, the plaintiff and defendant agreed that in the event of any civil divorce decree that the husband grant and the wife accept a Jewish divorce in accordance with the authority vested in the Beth Din for the Rabbinical Assembly" (D5-D6). The complaint requested that the court "declare the

rights and other legal relation of the plaintiff and defendant in the marriage contract (Ketubah)" and that the court require the petitioner to appear before the Beth Din (D8-D9).

Petitioner moved to dismiss the complaint on the grounds that the relief sought violated the First Amendment to the Constitution of the United States in that it would require petitioner to participate against his will in a wholly religious ceremony having no relationship whatsoever to any legal issue cognizable by the civil courts. Petitioner further argued in support of his motion to dismiss that the very process of hearing and deciding respondent's complaint would require the court to interpret and construe religious documents and questions

of religious law, thereby entangling the court in religious controversies in violation of the First Amendment.

Respondent filed a cross-motion for summary judgment. In support of her motion respondent submitted an affidavit from Rabbi Mordecai Kieffer, in which Rabbi Kieffer set forth his allegedly expert opinion of the proper translation and construction of the Ketubah under Jewish law, as well as other matters of Jewish law and religious practice. Respondent argued that on the basis of Rabbi Kieffer's purported expert analysis of Jewish law and documents, summary judgment should be granted.

Supreme Court Justice Aaron E. Klein denied petitioner's motion to dismiss the complaint and respondent's cross-motion for summary judgment (App C). The Court

held that the relief sought by the complaint would not violate the First Amendment because "if the alleged contract is in fact found to be an enforceable one, [it] would merely require a decree of this court of specific performance which would relegate the party so ordered to submit himself for a determination of religious law to a religious tribunal as purportedly agreed to by him on the basis of premarital papers" (C3). Justice Klein further held that resolution of the case required a plenary trial:

> . . . the court is confronted with varying and inconsistent contentions by the parties to this lawsuit as to the translation, meaning and effect of the [Ketubah], as well as the intent of the parties in executing the same. This is more properly treated in a plenary trial in which

> the respective claims may be weighed by the trial court after a full exposition of the subject matter. Thus the construction of the claimed agreement underlying this lawsuit would be an issue of fact to be resolved at such plenary trial.

(C7) (emphasis added).

4. The Appellate Division reversed. In an opinion for the court, Presiding Justice Mahoney with three Justices concurring, held that the Ketubah was essentially a religious document, entered into as part of a religious ceremony.

> The State, having already granted the parties a civil divorce, has no further interest in their marital status. It would thus be a dangerous precedent to allow State courts to enforce liturgical agreements concerning matters about which the State has no remaining concern.

(B2). The Court also held that respondent was barred from equitable relief by the "clean hands" doctrine. Justice Levine dissented from the court's opinion on the grounds that the facts alleged in the complaint, "if established at a trial could justify some appropriate exercise of the powers of the New York State Supreme Court, sitting as a court of equity, to enforce plaintiff's contractual rights, albeit with circumspection because of the freedom of religion and separation of church and State overtones to the case."
(B4).

5. Respondent appealed to the Court of Appeals of the State of New York. The Court of Appeals, in a 4-3 decision, reversed the judgment of the Appellate Division and remanded the case for trial

to the Supreme Court. Writing for the Court, Judge Wachtler held that respondent was merely seeking:

> . . . to enforce an agreement made by [petitioner] to appear before and accept the decision of a designated tribunal.
>
> Viewed in this manner the provisions of the Ketubah relied upon by [respondent] constitute nothing more than an agreement to refer the matter of a religious divorce to a non-judicial forum. Thus, the contractual obligation [respondent] seeks to enforce is closely analogous to an ante-nuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. . . . This agreement - the Ketubah - should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a non-judicial forum so long as its enforcement vio-

> lates neither the law nor the public policy of this state.

(A6-A7).

The Court went on to hold that judicial enforcement of the Ketubah upon a party to such an agreement would not be contrary to the First Amendment because the complaint merely sought "simply to compel [petitioner] to perform a secular obligation to which he contractually bound himself" (A8).

Judge Jones wrote a dissenting opinion on behalf of three judges. The dissent sought to demonstrate in great detail the extent to which judicial consideration and resolution of the complaint in this case would require "inquiry into and resolution of questions of Jewish law and tradition" (A12). Judge Jones pointed to the respondent's motion

(A14).

REASONS FOR GRANTING THE WRIT

1. This case raises substantial questions under the First and Fourteenth Amendments as to whether the civil courts may require a person to attend and participate in a convening of a religious court or proceeding having no legal significance under civil law. The Court of Appeals decision that respondent may seek and obtain a court order requiring the petitioner to submit to the ecclesiastical authority of the Beth Din marshals the power of the State in support of a religion Conservative Judaism, seeking to impose its will against the wishes of an individual who no longer recognizes the authority of that religious body. The Court of Appeals holding undermines the "wall of separation between Church and

State" Everson v. Board of Education, 330 U.S. 1, 16 (1946), which this Court has recognized for over a century.

No principal is more firmly established under the First Amendment than that state power must be completely separate and impartial in the realm of religious belief and practice. Not only must the State remain "neutral when it comes to competition between sects", Zorach v. Clausen, 343 U.S. 306, 314 (1952), but also it must take no steps which would "aid one religion", Everson, 330 U.S. at 18, or which would have the effect of fostering or encouraging religion generally. Abington School District v. Schempp, 374 U.S. 203 (1963). Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring).

The majority opinion of the Court of Appeals seeks to explain away the coercive impact upon petitioner of a court order requiring him to appear before the Beth Din by relying on the fact that petitioner apparently agreed to do so at the time of his marriage. That agreement, the Court of Appeals holds, is nothing more than an ordinary contract to submit a civil dispute to arbitration, and therefore may be enforced by the civil courts.

The fallacy in the Court of Appeals analysis is that it ignores the sole purpose for which respondent brought this lawsuit. The complaint in this case acknowledges the exclusive reason for seeking to compel petitioner's attendance at the Beth Din is so that respondent could obtain a religious divorce. Such a

divorce has no significance whatsoever under civil law. Moreover, the Beth Din has no power to decide any other issue cognizable under civil law nor does respondent seek to invoke its powers for any such purpose. Thus, there is no civil law issue to be arbitrated. The only question before the Beth Din would be the religious marital status of the parties.

The case is thus very different from a hypothetical case involving a prenuptial agreement to submit to an arbitrator future questions involving, for example, property rights or child custody. If such a dispute were submitted by agreement of the parties to a rabbi, priest or a clergyman for determination, no First Amendment problems need arise. This would be so, however, precisely because the rabbi, priest or

clergyman would be acting in a civil capacity to decide a question which is cognizable under civil law in civil courts.

In the present case, on the other hand, the Beth Din would be serving no civil function. Its only purpose is to consider whether, under Jewish law, a Jewish divorce should be granted.

Petitioner's earlier written promise to recognize the Beth Din's authority to summon him at the request of his former wife for religious purposes is thus unenforceable by the civil courts, which cannot require a person to recognize or submit to ecclesiastical authority no matter what promises such person may have made in the past.

2. This case also raises a second critical issue under the First Amendment. As recognized by the dissenting opinion of Judge Jones in the Court of Appeals, the mere process of adjudicating respondent's complaint will require the court to become impermissably entangled in questions of religious belief, doctrine and practice. For example, according to the respondent herself, the trial court will be required to hear expert testimony from rabbis and other religious officials on the meaning and construction of the Ketubah under Jewish law, and upon the procedures by which a person may be summoned to appear before the Beth Din. In order to resolve the complaint, the civil courts will have to decide what is, or is not, Jewish law. Indeed, respondent's very complaint requests that "the court

declare the rights and other legal relation of the plaintiff and defendant in the marriage contract (Ketubah)."

The Court of Appeals opinion thus requires unconstitutional entanglement between Church and State. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971). This Court has emphasized that civil courts may not inquire at all into "matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976). Indeed, it is "not only the conclusions that may be reached by the [courts] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979). Res-

pondent's complaint, simply cannot be adjudicated without violating the principals so firmly established by this Court's prior decisions.

This case does not, as the Court of Appeals states, involve resolution of a religious dispute according to neutral principles of law. Jones v. Wolf, 443 U.S. 595 (1979). The marital dispute between the parties was so resolved by a civil court when it entered the divorce decree. Resolution of respondent's claim here, on the other hand, will inevitably entangle the courts in interpretation of Jewish law and custom.

3. The problems presented by this case are by no means unique. Numerous courts in cases involving identical or related issues, have acknowledged the authority of the civil courts to compel

the cooperation of former spouses in religious divorces.* Under the decision of the Court of Appeals in this case, sanction will be given to additional litigation of this nature, thereby entangling the civil courts in religious disputes and placing the power and authority of the State on the side of established religion. This Court should

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* Shapiro v. Shapiro, 110 Misc. 2d 726, 442 N.Y.S.2d 931 (Sup. Ct. 1981), aff'd 88 A.D.2d 592, 449 N.Y.S.2d 806 (2d Dep't 1982); Margulies v. Margulies, 42 A.D.2d 517, 344 N.Y.S.2d 482 (1st Dep't), appeal dismissed, 33 N.Y.2d 894, 352 N.Y.S.2d 447, 307 N.E.2d 562 (1973); Matter of "Rubin" v. "Rubin", 75 Misc. 2d 776, 782, 348 N.Y.S.2d 61, 67 (Family Ct. 1973); Waxstein v. Waxstein, 90 Misc. 2d 784, 787, 395 N.Y.S.2d 877, (Sup. Ct. 1976), aff'd, 57 A.D.2d 863, 394 N.Y.S. 2d 253 (2d Dep't 1977); Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (Sup. Ct. 1954), aff'd 3 A.D.2d 853, 161 N.Y.S.2d 694 (2d Dep't 1957); Stern v. Stern, N.Y.L.J. Aug. 8, 1979, p. 13 col. 5 (Sup. Ct., Kings County 1979); Minkin v. Minkin, 180 N.J. Super. 260, 434 A.2d 665 (Ch. Div. 1981).

grant certiorari to resolve the constitutional issues raised and to correct the serious constitutional errors of the Court of Appeals.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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Dated : May 13, 1983

APPENDIX A

JUDGMENT AND OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUSAN R. AVITZUR, Appellant, v BOAZ AVITZUR, Respondent.

Argued January 3, 1983; decided February 15, 1983

SUMMARY

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 21, 1982, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (AARON E. KLEIN, J.), entered in Albany County, denying defendant's motion to dismiss the complaint and plaintiff's cross motion for summary judgment. The modification consisted of reversing so much of the order as denied defendant's motion to dismiss the complaint and granting the motion.

Plaintiff and defendant were married in 1966 in a ceremony conducted in accordance with Jewish tradition. Prior to the marriage ceremony, the parties signed a document known as a "Ketubah", in which they both agreed to recognize the "Beth Din", a rabbinical tribunal, as having authority to counsel the couple in matters concerning their marriage. In 1978, the defendant husband was granted a civil divorce upon the ground of cruel and inhuman treatment, but, notwithstanding this civil divorce, the wife is not considered divorced and may not remarry pursuant to Jewish law, until such a time as a Jewish divorce decree, known as a "Get", is granted. A Get may be obtained only after the husband and wife appear before the Beth Din, and plaintiff sought to summon defendant before this tribunal pursuant to the provisions of the Ketubah. After defendant refused to appear, plaintiff brought this action seeking an order compelling defendant's specific performance of the Ketubah's requirement that he appear before the Beth Din. Defendant moved to dismiss upon the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a cause of action. Special Term denied defendant's motion to dismiss and also denied plaintiff summary judgment. The Appellate Division modified and granted defendant's motion to dismiss, concluding that the document constituted a liturgical agreement, unenforceable where the State, having granted a civil divorce, has no further interest in the parties' marital status.

The Court of Appeals reversed and denied defendant's motion to dismiss the complaint, holding, in an opinion by Judge WACHTLER, that nothing in law or public policy prevents judicial recognition and enforcement of the secular terms of a religious marriage agreement.

Avitzur v Avitzur, 86 AD2d 133, reversed.

HEADNOTE

Husband and Wife — Divorce — Agreement to Secure Religious Dissolution of Marriage

Nothing in law or public policy prevents judicial recognition and enforcement of the secular terms of an agreement, known as a "Ketubah", which was entered into as part of a religious marriage ceremony. The provisions of the Ketubah, whereby defendant husband promised that he would appear before a religious tribunal known as a "Beth Din" for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a "Get", a Jewish religious divorce, constitute nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum, and are thus closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. Nor would enforcement of the terms of the Ketubah by a civil court violate the constitutional prohibition against excessive entanglement between church and State on the ground that the court must necessarily intrude upon matters of religious doctrine and practice, since this dispute can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle; the fact that all of the Ketubah's provisions may not be judicially recognized does not prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a nonjudicial forum.

POINTS OF COUNSEL

Richard A. Hanft for appellant. I. Execution and enforcement of the marriage contract does not constitute entanglement in a religious question. (*Matter of "Rubin" v "Rubin"*, 75 Misc 2d 776; *Matter of Blum Folding Paper Box Co. [Raften — Friedlander]*, 27 NY2d 35; *Board of Educ. [Auburn Teachers Assn.]*, 49 AD2d 35.) II. Appellant has stated a cause of action warranting a plenary trial. (*Jones v Wolf*, 443 US 595; *Hurwitz v Hurwitz*, 216 App Div 362; *Serbian Orthodox Diocese v Milivojevich*, 426 US 696; *Beulah Wesleyan Methodist Church v Henry*, 187 Misc 502; *Koeppel v Koeppel*, 3 AD2d 853; *Margulies v Margulies*, 42 AD2d 517; *Waxstein v Waxstein*, 90 Misc 2d 784, 57 AD2d 863; *Shapiro v Shapiro*, 110 Misc 2d 726; *Perlstein v Perlstein*, 76 AD2d 49.) III. Application of the doctrine of "unclean hands" is properly a matter for a Trial Judge. (*Da Silva v Musso*, 53 NY2d 543; *Meyer v Nebraska*, 262 US 390; *Griswold v Connecticut*, 381 US 479.)

Louis-Jack Pozner for respondent. I. New York civil courts may not properly adjudicate religious issues. (*McCollum v Board of Educ.*, 333 US 203; *Presbyterian Church v Hull Church*, 393 US 440; *Jones v Wolf*, 443 US 595; *Sherbert v Verner*, 374 US 398; *Russian Church of Our Lady of Kazan v Dunkel*, 33 NY2d 456.) II. This action was properly dismissed for failure of the complaint to state a cause of action. (*Sivakoff v Sivakoff*, 280 App Div 106; *Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310.) III. Summary judgment was properly granted to respondent dismissing the complaint. (*Margulies v Margulies*, 42 AD2d 517; *Pal v Pal*, 45 AD2d 738; *Waxstein v Waxstein*, 90 Misc 2d 784; *Koeppel v Koeppel*, 3 AD2d 853.) IV. Appellant's relief is barred by laches. (*Sherbert v Verner*, 374 US 398; *Elrod v Burns*, 427 US 347; *Wisconsin v Yoder*, 406 US 205.) V. New York State has pre-empted the field of divorce by the statutory scheme of the Domestic Relations Law, and the cause of action which appellant attempts to assert herein is not properly cognizable by the courts of the State of New York.

Nathan Lewin, Dennis Rapps, Daniel D. Chazin and *Ivan L. Tillem* for National Jewish Commission on Law and Public Affairs, *amicus curiae*. I. A prenuptial agreement to submit to rabbinical arbitration any controversy between husband and wife regarding "the standards of the Jewish law of marriage" is enforceable under CPLR 7501. (*Matter of Grayson-Robinson Stores* [*Iris Constr. Corp.*], 8 NY2d 133; *Lawrence Co. v Devonshire Fabrics*, 271 F2d 402; *Matter of Weinrott* [*Carp*], 32 NY2d 190; *Bowmer v Bowmer*, 50 NY2d 288; *Hirsch v Hirsch*, 37 NY2d 312; *Sheets v Sheets*, 22 AD2d 176; *Grien v Grien*, 51 AD2d 543; *Siegel v Ribak*, 43 Misc 2d 7; *Board of Educ. v Cracovia*, 36 AD2d 851.) II. The parties in this case signed a binding prenuptial agreement to arbitrate any postmarital religious obligations before a specified rabbinical tribunal. (*Matter of Hub Inds.* [*George Mfg. Co.*], 183 Misc 767, 269 App Div 177, 294 NY 897.) III. Enforcement of the parties' arbitration clause does not involve the court in religious entanglement. (*Hurwitz v Hurwitz*, 216 App Div 362; *Berman v Shatnes Lab.*, 43 AD2d 736; *Matter of Koslowski v Seville Syndicate*, 64 Misc 2d 109; *Matter of Berk*, 8 Misc 2d 732;

Serbian Orthodox Diocese v Milivojevich, 426 US 696; *Jones v Wolf*, 443 US 595; *Maryland & Va. Churches v Sharpsburg Church*, 396 US 367; *Margulies v Margulies*, 42 AD2d 517, 33 NY2d 894; *Matter of "Rubin" v "Rubin"*, 75 Misc 2d 776; *Waxstein v Waxstein*, 90 Misc 2d 784, 57 AD2d 863.)

Robert J. Jossen and *Stanley J. Friedman* for Jewish Theological Seminary of America, *amicus curiae*. As a matter of law there is no proscription against specific performance of the Ketubah to require defendant to submit to the jurisdiction of a Beth Din. (*Matter of Philips*, 293 NY 483, 294 NY 662; *Matter of Sunshine*, 51 AD2d 326, 40 NY2d 875; *Johnston v Spicer*, 107 NY 185; *Strebler v Wolf*, 152 Misc 859; *Hurwitz v Hurwitz*, 216 App Div 362; *Perlstein v Perlstein*, 76 AD2d 49; *Margulies v Margulies*, 42 AD2d 517; *Waxstein v Waxstein*, 90 Misc 2d 784, 57 AD2d 863; *Matter of "Rubin" v "Rubin"*, 75 Misc 2d 776, *Koeppel v Koeppel*, 3 AD2d 853.)

OPINION OF THE COURT

WACHTLER, J.

This appeal presents for our consideration the question of the proper role of the civil courts in deciding a matter touching upon religious concerns. At issue is the enforceability of the terms of a document, known as a Ketubah, which was entered into as part of the religious marriage ceremony in this case. The Appellate Division held this to be a religious covenant beyond the jurisdiction of the civil courts. However, we find nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of such an agreement. There should be a reversal.

Plaintiff and defendant were married on May 22, 1966 in a ceremony conducted in accordance with Jewish tradition. Prior to the marriage ceremony, the parties signed both a Hebrew/Aramaic and an English version of the "Ketubah". According to the English translation, the Ketubah evidences both the bridegroom's intention to cherish and provide for his wife as required by religious law and tradition and the bride's willingness to carry out her obligations to her husband in faithfulness and affection according to Jewish law and tradition. By signing the Ketu-

bah, the parties declared their "desire to *** live in accordance with the Jewish law of marriage throughout [their] lifetime" and further agreed as follows: "[W]e, the bride and bridegroom *** hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision."

Defendant husband was granted a civil divorce upon the ground of cruel and inhuman treatment on May 16, 1978. Notwithstanding this civil divorce, plaintiff wife is not considered divorced and may not remarry pursuant to Jewish law, until such time as a Jewish divorce decree, known as a "Get", is granted. In order that a Get may be obtained plaintiff and defendant must appear before a "Beth Din", a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law. Plaintiff sought to summon defendant before the Beth Din pursuant to the provision of the Ketubah recognizing that body as having authority to counsel the couple in the matters concerning their marriage.

Defendant has refused to appear before the Beth Din, thus preventing plaintiff from obtaining a religious divorce. Plaintiff brought this action, alleging that the Ketubah constitutes a marital contract, which defendant has breached by refusing to appear before the Beth Din, and she seeks relief both in the form of a declaration to that effect and an order compelling defendant's specific performance of the Ketubah's requirement that he appear before the Beth Din. Defendant moved to dismiss the complaint upon the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a cause of action, arguing that resolution of the dispute and any grant of relief to plaintiff would involve the civil court in

impermissible consideration of a purely religious matter. Plaintiff, in addition to opposing the motion, cross-moved for summary judgment.

Special Term denied defendant's motion to dismiss, noting that plaintiff sought only to compel defendant to submit to the jurisdiction of the Beth Din, an act which plaintiff had alleged defendant bound himself to do. That being the only object of the lawsuit, Special Term was apparently of the view that the relief sought could be granted without impermissible judicial entanglement in any doctrinal issue. The court also denied plaintiff's motion for summary judgment, concluding that issues concerning the translation, meaning and effect of the Ketubah raised factual questions requiring a plenary trial.

The Appellate Division modified, granting defendant's motion to dismiss. Inasmuch as the Ketubah was entered into as part of a religious ceremony and was executed, by its own terms, in accordance with Jewish law, the court concluded that the document constitutes a liturgical agreement. The Appellate Division held such agreements to be unenforceable where the State, having granted a civil divorce to the parties, has no further interest in their marital status.

Accepting plaintiff's allegations as true, as we must in the context of this motion to dismiss, it appears that plaintiff and defendant, in signing the Ketubah, entered into a contract which formed the basis for their marriage. Plaintiff has alleged that, pursuant to the terms of this marital contract, defendant promised that he would, at plaintiff's request, appear before the Beth Din for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a Get. It should be noted that plaintiff is not attempting to compel defendant to obtain a Get or to enforce a religious practice arising solely out of principles of religious law. She merely seeks to enforce an agreement made by defendant to appear before and accept the decision of a designated tribunal.

Viewed in this manner, the provisions of the Ketubah relied upon by plaintiff constitute nothing more than an agreement to refer the matter of a religious divorce to a

nonjudicial forum. Thus, the contractual obligation plaintiff seeks to enforce is closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. There can be little doubt that a duly executed antenuptial agreement, by which the parties agree in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable (e.g., *Matter of Sunshine*, 40 NY2d 875, affg 51 AD2d 326; *Matter of Davis*, 20 NY2d 70). Similarly, an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity (*Hirsch v Hirsch*, 37 NY2d 312; see *Bowmer v Bowmer*, 50 NY2d 288, 293). This agreement — the Ketubah — should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor the public policy of this State (*Hirsch v Hirsch, supra*, at p 315).

Defendant argues, in this connection, that enforcement of the terms of the Ketubah by a civil court would violate the constitutional prohibition against excessive entanglement between church and State, because the court must necessarily intrude upon matters of religious doctrine and practice. It is urged that the obligations imposed by the Ketubah arise solely from Jewish religious law and can be interpreted only with reference to religious dogma. Granting the religious character of the Ketubah, it does not necessarily follow tha any recognition of its obligations is foreclosed to the courts.

It is clear that judicial involvement in matters touching upon religious concerns has been constitutionally limited in analogous situations, and courts should not resolve such controversies in a manner requiring consideration of religious doctrine (*Presbyterian Church v Hull Church*, 393 US 440, 449; *Serbian Orthodox Diocese v Milivojevich*, 426 US 696, 709; *Jones v Wolf*, 443 US 595, 603; see, e.g., *Reardon v Lemoyne*, __ NH __, __ [Dec. 23, 1982]). In its most recent pronouncement on this issue, however, the Supreme Court, in holding that a State may adopt any approach to resolving religious disputes which does not entail consideration of doctrinal matters, specifically approved the use of the "neutral principles of law" approach as consistent with

constitutional limitations (*Jones v Wolf, supra*, at p 602). This approach contemplates the application of objective, well-established principles of secular law to the dispute (*id.*, at p 603), thus permitting judicial involvement to the extent that it can be accomplished in purely secular terms.

The present case can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle. Consequently, defendant's objections to enforcement of his promise to appear before the Beth Din, based as they are upon the religious origin of the agreement, pose no constitutional barrier to the relief sought by plaintiff. The fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable. Solemnization of the marital relationship often takes place in accordance with the religious beliefs of the participants, and this State has long recognized this religious aspect by permitting duly authorized pastors, rectors, priests, rabbis and other religious officials to perform the ceremony (Domestic Relations Law, § 11, subds 1, 7). Similarly, that the obligations undertaken by the parties to the Ketubah are grounded in religious belief and practice does not preclude enforcement of its secular terms. Nor does the fact that all of the Ketubah's provisions may not be judicially recognized prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a nonjudicial forum (see *Ferro v Bologna*, 31 NY2d 30, 36). The courts may properly enforce so much of this agreement as is not in contravention of law or public policy.

In short, the relief sought by plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself. In this regard, no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result. Certainly nothing the Beth Din can do would in any way affect the civil divorce. To the extent that an enforceable promise can be found by the application of neutral principles of contract law, plaintiff will have demonstrated entitlement to the relief sought. Consideration of other substantive issues bearing upon plaintiff's entitlement to a religious divorce, however, is

appropriately left to the forum the parties chose for resolving the matter.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendant's motion to dismiss the complaint denied.

JONES, J. (dissenting). We are of the opinion that to grant the relief plaintiff seeks in this action, even to the limited extent contemplated by the majority, would necessarily violate the constitutional prohibition against entanglement of our secular courts in matters of religious and ecclesiastical content. Accordingly, we would affirm the order of the Appellate Division.

We start on common ground. Judicial intervention in disputes with respect to religious and ecclesiastical obligation is constitutionally proscribed, save with respect to a narrow class of issues, as to which, under "neutral principles of law", the secular component of the religious and ecclesiastical rights and obligations may be resolved without impermissible trespass on or even reference to religious dogma and doctrine (pp 114-115). We depart from the conclusion of the majority that in this case the courts may discern one or more discretely secular obligations which may be fractured out of the "Ketubah", indisputably in its essence a document prepared and executed under Jewish law and tradition.

We are constrained, as is the majority, by the allegations of the complaint. Plaintiff therein alleges: that the parties were married on May 22, 1966 in a religious ceremony in accordance with Jewish law and tradition; that pursuant to the terms and conditions of the religious ceremony they entered into a contract known as a "Ketubah"; that under the Ketubah the husband declared and contracted with the wife to be her husband according to the law of Moses and Israel and to honor and support her, faithfully cherishing her and providing for her needs as Jewish husbands are required to do pursuant to Jewish religious law and tradition; that pursuant to the Ketubah the parties agreed to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America as having authority to summon either party at the request of the other

and further agreed that in the event of any civil divorce decree the husband would grant and the wife accept a Jewish divorce ("get") in accordance with the authority vested in the Beth Din; that under the law of Moses should the husband arbitrarily refuse to give a "get" the wife, such as plaintiff in this case, is known and referred to as an "Aguna" which is a state of limbo wherein the wife is considered neither married nor divorced; that a judgment of civil divorce of the parties was entered on May 16, 1978 in the Albany county clerk's office; that the wife has requested and summoned the husband to appear before the Beth Din of the Rabbinical Assembly pursuant to the terms of the Ketubah but that he has willfully and intentionally refused to appear before the assembly in violation of his contractual obligations; that in consequence the wife is consigned to the status of "Aguna" and is barred from remarrying within the context of a Jewish religious ceremony. The wife demands judgment against the husband: declaring "the rights and other legal relation of the plaintiff and defendant in the marriage contract (Ketubah), created by reason of the written instrument"; declaring that the husband specifically perform pursuant to the terms and conditions of the Ketubah in that he appear before the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives pursuant to the wife's request; declaring that failure of the husband so to appear constitutes a breach of contract; and for other incidental relief.

Determination whether judicial relief may be granted the wife without constitutionally impermissible interjection of the court into matters of religious and ecclesiastical content requires examination of the English translation of the Ketubah in the context of the wife's allegation that this document was made and entered into as part of the religious ceremony in accordance with Jewish law and tradition:

"On the First Day of the Week, the 3rd Day of the Month Sivan, 5726, corresponding to the 22nd Day of May, 1966, Boaz Avitzur, the bridegroom, and Susan Rose Wieder, the bride, were united in marriage in Old Westbury, N.Y. The bridegroom made the following declaration to his bride: 'Be

thou my wife according to the law of Moses and Israel. I shall honor and support thee, faithfully I shall cherish thee and provide for thy needs, even as Jewish husbands are required to do by our religious law and tradition.'

"In turn, the bride took upon herself the duties of a Jewish wife, to honor and cherish her husband, and to carry out all her obligations to him in faithfulness and affection as Jewish law and tradition prescribe.

"And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: As evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom, attach our signatures to this Ketubah, and hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

"This Ketubah was executed and witnessed this day in accordance with Jewish law and tradition.

"Boaz Avitzur bridegroom Susan Wieder bride Melvin Kieffer rabbi Abraham Weisman witness Melvin Kieffer witness."

At the outset we observe that the complaint contains no allegation that the parties intended that the Ketubah should manifest secular promises or have any civil or secular status or any legal significance independent of the religious ceremony between them of which it was an integral part. Nor is any such assertion advanced in the papers submitted by the wife in support of her cross motion for summary judgment.

Moreover, it appears evident to us that any determination of the content and particulars of the rights of the wife

or the obligations of the husband under this document cannot be made without inquiry into and resolution of questions of Jewish religious law and tradition. We think it inaccurate to identify the relief sought by plaintiff, as does the majority, as "simply to compel defendant to perform a secular obligation to which he contractually bound himself." (At p 115.)

The complaint's first request for relief paints with a broad brush, asking that the court "declare the rights and other legal relation of the plaintiff and defendant in the marriage contract" created by reason of the Ketubah. That such an all-encompassing declaration of rights exceeds the authority of the civil court seems to be implicitly conceded by the majority's attempt to limit its consideration to enforcement of an obligation characterized as "secular" — the alleged obligation of the husband to appear before the Beth Din.

The wife's pleading itself, however, not to mention the affidavits submitted by her, makes it clear that even a definition of the purported "secular obligation" requires an examination into the principles and practice of the Jewish religion. Although the English translation of the Ketubah attached to the complaint recites that the parties "recognize the Beth Din * * * as having authority * * * to summon either party at the request of the other", the complaint seeks a declaration that the husband specifically perform "in that he appear before the Beth Din * * * pursuant to the request of the plaintiff". Thus, the wife tenders her construction of the document, which in turn presumably is predicated on what she contends is tradition in the faith, i.e., that there is an obligation imposed by the agreement to appear before the Beth Din at the summons alone of the other party to the marriage despite the facial reference to a summons by the Beth Din. The husband, tendering his own construction of the document, denies that he is under any obligation to appear before the Beth Din because an earlier request by him for convocation of such a body was refused. Thus, it appears evident that any judicial determination whether the husband is obligated to appear before the Beth Din, or what nature of summons is required to call such

obligation into play, necessarily involves reference to substantive religious and ecclesiastical law.*

The unsoundness of the position espoused by the majority to justify judicial action to compel the husband to appear before the Beth Din, is revealed by projection of the course the continuing litigation will take in this case. The motion to dismiss and the cross motion for summary judgment having both been denied, the case will be set down for trial. The evidence which the wife may be expected to introduce is revealed by examination of the affidavits she submitted in opposition to the motion to dismiss and in support of her cross motion for summary judgment. Her affidavit conveys information furnished her by Rabbi Mordecai Kieffer who in his accompanying affidavit describes himself as "qualified to render an expert opinion concerning matters of Jewish laws and custom". She relies on his affidavit to support her claim that there was "good and legal consideration" for the Ketubah and that the Beth Din presently has no authority to compel the husband to submit to its jurisdiction. The rabbi, predicated on what he offers as a more accurate translation of the Ketubah into English, expresses the opinion that "good and legal consideration" is to be found in the document itself. Then, describing in detail the procedures incident to the issuance of a "get", the rabbi concludes that the husband was obligated to submit to the jurisdiction of the Beth Din without the issuance of any summons by it. Accordingly, it is evident that the wife and her counsel are themselves of the view that substantiation of her position will depend on expert opinion with respect to Jewish law and tradition.

The majority's reference to the fact that marriage relationships solemnized within a religious context are recognized by the civil law is not determinative of the question here presented where what is sought to be enforced is an aspect of the relationship peculiar to the religion within which the ceremony creating it took place. No authority is cited in which a civil court has enforced a concomitant undertaking required by the ecclesiastical authority under which the marriage ceremony was solemnized. That no

* The recital in the testimonium clause itself is indicative — "this Ketubah was executed and witnessed this day in accordance with Jewish law and tradition."

such civil enforcement of the obligation to appear before the Beth Din was contemplated either by the drafter of the Ketubah or by the parties as its signatories is evident from the inclusion of explicit authorization to the Beth Din "to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision". Nothing in the record suggests that it was the intention of the parties when they signed this religious document that the civil courts of the State of New York were to have jurisdiction to determine the substantive rights created thereby or to invoke civil procedures and remedies for the enforcement of such rights. Indeed, any conclusion on the part of our courts that this express provision was not intended by the parties as the exclusive remedy available to them for any breach of their obligations under the Ketubah would itself necessarily entail examination of Jewish law and tradition.

Finally, the evident objective of the present action — as recognized by the majority and irrefutably demonstrated by the complaint — even if procedural jurisdiction were to be assumed, is to obtain a religious divorce, a matter well beyond the authority of any civil court. (Again supplying her own interpretation of the Ketubah, the wife alleges: "That pursuant to the terms of the Ketubah, the plaintiff and defendant agreed that in the event of any civil divorce decree that the husband grant and the wife accept a Jewish divorce decree in accordance with the authority vested in the Beth Din of the Rabbinical Assembly".) As was noted at the Appellate Division, the interest of the civil authorities of the State of New York in the status of the marriage between these parties was concluded when the final judgment of divorce was entered in 1978.

Chief Judge COOKE and Judges FUCHSBERG and MEYER concur with Judge WACHTLER; Judge JONES dissents and votes to affirm in a separate opinion in which Judges JASEN and SIMONS concur.

Order reversed, etc.

APPENDIX B

OPINION OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

SUSAN R. AVITZUR, Respondent, v BOAZ AVITZUR, Appellant.

Third Department, April 8, 1982

SUMMARY

APPEAL from an order of the Supreme Court at Special Term (AARON E. KLEIN, J.), entered January 8, 1981 in Albany County, which denied defendant's motion to dismiss the complaint.

HEADNOTE

Husband and Wife — Divorce — Agreement to Secure Religious Dissolution of Marriage

Plaintiff and defendant, who had been married in a Jewish religious ceremony and signed a written agreement known as a "Ketubah" as part of the ceremony, were subsequently divorced, and plaintiff, desirous of obtaining a Jewish religious divorce, known as a "Get", commenced an action for specific performance of the Ketubah's requirement that defendant appear before a Jewish religious tribunal known as the "Beth Din", which is necessary in order to obtain a Get; defendant's motion to dismiss the complaint is granted, since the State, having already granted the parties a civil divorce, has no further interest in their marital status and a court will not enforce liturgical agreements concerning matters about which the State has no remaining concern. Moreover, a person seeking to invoke the court's equitable power of compelling specific performance should come before the court with clean hands, and plaintiff, who has had a civil divorce on fault grounds granted against her, has failed to state a cause of action for the relief sought.

APPEARANCES OF COUNSEL

Louis-Jack Pozner for appellant.

Lee, LeForestier, Malone, Smith & Hanft (*Richard A. Hanft* of counsel), for respondent.

OPINION OF THE COURT

MAHONEY, P. J.

Married in a Jewish religious ceremony on May 22, 1966, plaintiff and defendant signed a written agreement known as a "Ketubah" that same day as part of the religious ceremony. On May 17, 1978, defendant obtained a civil divorce in the State Supreme Court on the ground of plaintiff's cruel and inhuman treatment. Desirous of obtaining a Jewish religious divorce, known as a "Get", plaintiff commenced this action in February of 1980 for specific performance of the Ketubah's requirement that defendant appear before a Jewish religious tribunal known as the "Beth Din", which is necessary in order to obtain a

Get. Defendant moved to dismiss the complaint pursuant to CPLR 3211 on the grounds that plaintiff lacked capacity to sue, that the complaint failed to state a cause of action and failed to name certain necessary parties. Plaintiff cross-moved for summary judgment. Special Term denied both motions and this appeal by defendant ensued.

Defendant argues that this lawsuit involves matters which are religious in nature and that it would require an unconstitutional entanglement between church and State for the Supreme Court to assume jurisdiction over the action. Special Term, in rejecting this argument, found no such entanglement. Instead, it viewed the real object of the lawsuit as seeking "a command upon the individual defendant to do what is alleged he agreed to do in advance." We cannot agree. The agreement which plaintiff is attempting to specifically enforce was entered into as part of a religious ceremony and, by its own terms, was "executed and witnessed * * * in accordance with Jewish law and tradition." The State, having already granted the parties a civil divorce, has no further interest in their marital status. It would thus be a dangerous precedent to allow State courts to enforce liturgical agreements concerning matters about which the State has no remaining concern. Viewed in this manner, the cases cited by Special Term in support of its jurisdiction to enforce a Ketubah are inapposite since those cases involved situations where the Ketubah's terms had been incorporated in a subsequent civil agreement (*Margulies v Margulies,* 42 AD2d 517, app dsmd 33 NY2d 894 [stipulation in open court]; *Waxstein v Waxstein,* 90 Misc 2d 784, affd 57 AD2d 863 [separation agreement]; *Matter of "Rubin" v "Rubin",* 75 Misc 2d 776 [written stipulation of settlement]; *Koeppel v Koeppel,* 138 NYS2d 366, affd 3 AD2d 853 [separation agreement]). Only the unreported case of *Stern v Stern* (Supreme Ct, Kings County, Aug. 8, 1979, HELD, J.) has granted specific performance of the Ketubah itself, as distinguished from the subsequent ratification of its provisions. We decline to follow this decision.

Moreover, assuming, *arguendo*, that this matter involved a civil contract over which State courts could properly exercise jurisdiction, it is our view that defendant's motion to dismiss for failure to state a cause of action

should have been granted. The parties to this action have already been civilly divorced. By commencing this action for specific performance of the Ketubah, plaintiff is asking the State court system to act as the enforcement mechanism whereby defendant will be compelled to appear before the Beth Din. The sole purpose behind compelling this appearance is to enable plaintiff to obtain a religious divorce so that she may at some time in the future marry in accordance with her religious beliefs.

A person seeking to invoke the court's equitable power of compelling specific performance should come before the court with clean hands (*Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 316; 20 NY Jur [rev ed], Equity, §§ 102-111). Plaintiff in the instant case has already been judicially found to have breached her marriage vows and had a divorce on fault grounds granted against her. Under these circumstances, plaintiff's complaint fails to state a cause of action for the relief being sought.

Accordingly, Special Term erred in failing to grant defendant's motion to dismiss the complaint.

The order should be modified, on the law, by reversing so much thereof as denied defendant's motion to dismiss the complaint, and the motion granted, and, as so modified, affirmed, with costs.

LEVINE, J. (dissenting). Of course, for purposes of this motion to dismiss the complaint, plaintiff's pleadings and supporting papers must be accepted as true and are entitled to every legitimate inference to be drawn therefrom. We must, therefore, accept as established (1) that there was an actual meeting of the minds between the parties as to the portion of the Ketubah in which they mutually undertook to obtain a Get in the event of a civil divorce, and that their promises were supported by consideration; (2) that defendant's involvement in obtaining the Get could be as minimal as merely appearing before a rabbi to disclose the relevant information and to execute the Get document, and thus, enforcement of this portion of the Ketubah does not entail any religious observance, performance of ritual, or invasion of personal convictions by or on the part of defendant; and (3) that defendant's refusal to

submit to the Get prevents plaintiff from the free exercise of her religion in becoming remarried in a Jewish religious ceremony.

In my view, these facts, if established at a trial, could justify some appropriate exercise of the powers of the New York State Supreme Court, sitting as a court of equity, to enforce plaintiff's contractual rights, albeit with circumspection because of the freedom of religion and separation of church and State overtones to the case.

The majority's reasoning is that because the parties have been divorced civilly and the Ketubah was entered into as part of a religious marriage ceremony, the State has no further interest in the parties' marital status and, therefore, should not "enforce liturgical agreements concerning matters about which the State has no remaining concern".

That the agreement was made as part of a religious ceremony and was executed "in accordance with Jewish law and tradition" does not render it illegal and unenforceable, and indeed to so hold would pose the same First Amendment problems the majority seeks to avoid by its decision. The direct enforcement of provisions of a Ketubah, without reaffirmation in a subsequent or separate nonliturgical agreement, was upheld in *Hurwitz v Hurwitz* (216 App Div 362). *Hurwitz'* rejection of absolute invalidity of the Ketubah as a contract, at least at the pleading stage, is equally applicable here (p 366): "All that we have before us in the present case is a simple agreement, made between a man and a woman in contemplation of marriage, and the sole questions are, what was the agreement and whether the agreement is legal. If it is, then it should be enforced according to the intent of the parties who united in making it. If it is not legal, then the courts should so declare. But I do not see how any court can render intelligent judgment in the premises until there has been a proper judicial investigation by a trial of the issues raised in the pleadings." True, *Hurwitz* involved enforcement of a portion of a Ketubah dealing with property rights during widowhood, but I should think that plaintiff's right to have her marriage finally disposed of through a religious divorce and her right to remarry in a religious ceremony are entitled to no less legal consideration. Similar interests

have been recognized as legally cognizable in other contexts (*Brillis v Brillis*, 4 NY2d 125; *Aufiero v Aufiero*, 222 App Div 479; *Rutstein v Rutstein*, 221 App Div 70).

Likewise, the fact that the parties are already civilly divorced does not preclude enforcement of the promise to submit to a Get under a valid antenuptial agreement, which the Ketubah must be deemed to constitute at this state of the litigation. As to this basis for the majority's holding, the instant case is indistinguishable from *Margulies v Margulies* (42 AD2d 517, app dsmd 33 NY2d 894) and *Waxstein v Waxstein* (90 Misc 2d 784, affd 57 AD2d 863). In both these cases, the absence of any State interest in the marital status of the parties following civil divorce did not prevent judicial enforcement of the promise subsequently to obtain a Jewish divorce. The State's interest in enforcing agreements exists no less in the case of an antenuptial agreement, i.e., the Ketubah, than in the separation agreements involved in these cases.

It is also inappropriate to dispose of plaintiff's action at the pleading stage on the basis of the clean hands doctrine, the majority's alternative ground for dismissing the complaint. We ignore the realities of modern divorce litigation by holding that the granting of an uncontested divorce to defendant, after protracted negotiations, establishes in and of itself such misconduct on plaintiff's part as to result in a total forfeiture of her contractual rights. This, too, is an issue that should only be resolved after full exploration of the relative equities of the parties at a trial.

For all of the foregoing reasons, Special Term's denial of the motion to dismiss should be affirmed.

SWEENEY, KANE and WEISS, JJ., concur with MAHONEY, P. J.; LEVINE, J., dissents and votes to affirm in a separate opinion.

Order modified, on the law, by reversing so much thereof as denied defendant's motion to dismiss the complaint, and motion granted, and, as so modified, affirmed, with costs.

APPENDIX C

OPINION OF SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

STATE OF NEW YORK
SUPREME COURT:COUNTY OF ALBANY

SUSAN ROE AVITZUR,

Plaintiff,

- against -

BOAZ AVITZUR,

Defendant

Sullivan County Special Term, October 10th, 1980

Motion No. 25

KLEIN, J.

Defendant's motion under CPLR §3211 seeks to dismiss this action for four stated reasons, viz, lack of capacity of the plaintiff to sue; failure to join all necessary parties in the suit; lack of jurisdiction over the subject matter by the court, and the failure of the complaint to set forth a cause of action. There is a cross-motion by which the plaintiff seeks under CPLR §3212 (b)

three forms of affirmative relief for herself, as well as denial of the relief sought by the original moving party. The relief sought by the plaintiff is partial summary judgment in the following forms: Specific performance by the defendant of the terms of a document dated May 22nd, 1966; partial summary judgment in the form of a declaratory judgment holding that the defendant has breached the terms of the said document claimed to be a contract between the parties to this action; and finally, partial summary judgment defining the relationship of the plaintiff to the action, vis-a-vis, the document so claimed to be a contractual undertaking on their parts.

The court first considers the issue raised of the jurisdiction by this court over the subject matter of the lawsuit. Defendant's contention that no such

jurisdiction exists, rests upon the claim that the lawsuit is so intertwined with religious matters that historically, beginning with the First Amendment of the Constitution of the United States and of Article I, §3 of the Constitution of the State of New York, both of which guarantee religious freedom, the courts of the State will take a hands off policy. This court takes the opposite view, that the relief sought in this suit, if the alleged contract is in fact found to be an enforceable one, would merely require a decree of this court of specific performance which would relegate the party so ordered to submit himself for a determination of religious law to a religious tribunal as purportedly agreed to by him in the basic premarital papers. By virtue of this reasoning, the court reaches the conclusion that for purposes

of establishing the legality and viability of the alleged premarital agreement, plaintiff clearly has standing before this court. Through the same stream of reasoning, the court reaches the conclusion that to require the dismissal of the complaint for failure of joinder of certain "necessary" parties, to wit, the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, would in itself trespass upon the doctrine of separation of church and state since it inevitably suggests that a civil court of law might order and command a religious tribunal to subject itself to the directions of this court. Rather, the court considers the real object of this lawsuit to be a command upon the individual defendant to do what is alleged he agreed to do in advance, namely, to submit himself to the juris-

diction of those institutions so named. It is clear that no decree of this court should have the effect of interfering in or with the religious functioning of such bodies. The view thus taken is in harmony with a line of cases decided through the years, beginning with Koeppel v. Koeppel, 138 NYS 2d 366 aff'd 3 A.D.2d 853; Margulies v. Margulies, 42 A.D.2d; 517, app. dsmd. 33 N.Y.2d 894; "Rubin" v. "Rubin", 75 Misc. 2d 776; Waxstein v. Waxstein, 90 Misc. 2d 784, and probably most recently, Stern v. Stern, NYLJ, August 8, 1979, opinion by Hon. Gerald S. Held.

While the complaint, in some of its allegations, appears to go beyond the scope of the foregoing reasoning of subject matter jurisdiction by this court, there are sufficient alternative allegations in the complaint which can basic-

ally be described as the charges of failure and refusal on the part of the individual defendant to carry out his alleged agreement through his resistance to appear before those religious bodies which support the viability of the complaint. Underlying those allegations is the request that the court review the claimed contract to see if the plaintiff's contentions are borne out by the documents executed, admittedly, by both parties. Of course, on a motion to dismiss the complaint for failure to state a cause of action, it must be very clear that no relief can be granted under the facts alleged in the complaint (see Richardson v. Richardson, 58 AD2d 861) to support its dismissal. Here, the plaintiff has alleged a legally sufficient complaint for declaratory judgment of the rights between these parties.

Turning now to the defendant's and plaintiff's motions for summary judgment, the court is confronted with varying and inconsistent contentions by the parties to this lawsuit as to the translation, meaning and effect of the document aforedescribed, as well as the intent of the parties in executing the same. This is more properly treated in a plenary trial in which the respective claims may be weighed by the trial court after a full exposition of the subject matter. Thus the construction of the claimed agreement underlying this lawsuit would be an issue of fact to be resolved at such plenary trial. (Cf. Meathe v. State University Construction Fund, 65 AD 49, 52.) Since summary judgment has been described as the procedural equivalent to a trial, (Crowley's Milk Company v. Klein, 24 AD2d 920) it would be inappro-

priate at this juncture to resolve the controversy before this court on mere submissions.

Accordingly, the motion and cross-motion for summary judgment must be denied.

(Attorneys for plaintiff to submit one order in accordance herewith.)

Dated: Kingston, New York
December 3rd, 1980

APPENDIX D

COMPLAINT

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

- - - - - - - - - - - - - - - - - - - x

SUSAN ROE AVITZUR, :

Plaintiff, :

- against - :

BOAZ AVITZUR, :

Defendant. :

- - - - - - - - - - - - - - - - - - - x

COMPLAINT

Plaintiff, for a Complaint by her attorneys, Lee, LeForestier, Malone, Smith & Hanft, P.C., herein alleges as follows:

1. Plaintiff now resides and at all times hereinafter mentioned did reside in the City of Albany, County of Albany and State of New York.

2. That the plaintiff and defendant were married in the Village of Westbury, County of Nassau, State of New York on the 22nd day of May, 1966.

3. That there is an issue of said marriage, to wit, Michael David, born October 17, 1968.

4. Upon information and belief defendant was at all times herein mentioned and still is a resident and domicil of the County of Albany, State of New York.

5. That a Judgment of Divorce was granted to the defendant on the 16th day of May, 1978 which was duly filed in the office of the Clerk of the County of Albany, State of New York.

6. On the 22nd day of May, 1966, the plaintiff and defendant were married in a religious ceremony in accordance with Jewish law and tradition.

7. Pursuant to the terms and conditions of the religious ceremony the parties willingly and voluntarily entered into a contract which constituted the

basis for the marriage and said marriage was and is and did constitute a contractual relationship.

8. That the aforementioned contract entered into by the plaintiff and defendant is hereinafter known as a "Ketubah", a copy of which is in Hebrew and a copy of its English translation and are annexed hereto and made a part hereof as Exhibit "A" and "A-1" which provides that defendant will respect and support his wife in accordance with his means.

9. That the aforementioned Ketubah constructually provides that plaintiff take upon herself the duties of a Jewish wife, to honor and cherish her husband, the defendant, and to carry out all her obligations to him in faithfulness and affection as Jewish law and tradition prescribe.

10. That pursuant to the terms and conditions of the Ketubah, the defendant declared and contracted with the plaintiff to be her husband according to the law of Moses and Israel and further contracted to honor and support the plaintiff faithfully cherishing her and providing for her needs as Jewish husbands are required to do pursuant to Jewish religious law and tradition.

11. Pursuant to the terms of the Ketubah, the plaintiff and defendant agreed to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives having authority to counsel to plaintiff and defendant in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion and to summon either party at

the request of the other in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout the lifetime of both the plaintiff and defendant.

12. That on the 22nd day of May, 1966, pursuant to execution of the Ketubah, the plaintiff and defendant conducted a ceremony whereby the defendant vowed to the plaintiff in the presence of the officiating clergymen duly authorized by the law of the State of New York to engage such a matrimonial ceremony to wit "Behold thou art betrothed onto me with this ring in accordance with the law of Moses and Israel."

13. That pursuant to the terms of the Ketubah, the plaintiff and defendant agreed that in the event of any civil divorce decree that the husband grant and

the wife accept a Jewish divorce in accordance with the authority vested in the Beth Din of the Rabbinical Assembly.

14. That obtaining a divorce pursuant to the law of Moses is hereafter known as obtaining a "Get".

15. That pursuant to the law of Moses should the husband arbitrarily refuse to give a divorce, the wife, such as plaintiff, is hereinafter known as and referred to as an "Aguna" which is a state of limbo wherein the wife is considered neither married or divorced.

16. Pursuant to Jewish Law and the terms of the Ketubah entered into between plaintiff and defendant, plaintiff is not considered divorced nor is she permitted to remarry despite the fact that a civil tribunal granted to the wife the right to remarry.

17. That since on or about the 16th day of May, 1978, and continuing to date, plaintiff has requested and summoned to defendant to appear before the Beth Din of the Rabbinical Assembly pursuant to the terms of the annexed Ketubah but defendant willfully and intentionally refuses to appear before said Assembly in violation of his contractual obligations.

18. That failure on the part of the husband, such as defendant, to appear before the Beth Din consigns plaintiff to the status of "Aguna" and unable to remarry within a religious ceremony since Judaism considers the wife, such as plaintiff, remarried (sic) until such time as defendant fulfills his contractual obligations.

19. That defendant willfully refuses to appear before the Beth Din of the Rabbinical Assembly and the Jewish

Theological Seminary of America in violation of his contractual obligation to appear has resulted in the inability of plaintiff to obtain a Jewish divorce (Get) and the plaintiff is further barred from remarrying within the contexts of a Jewish religious ceremony.

21. That there is a present justiciable controversy which exists and the plaintiff does not have an adequate remedy at law.

22. That plaintiff has been obligated to make expenditures of sums of money to enforce her legal rights pursuant to the Domestic Relations Law of the State of New York.

WHEREFORE, plaintiff demands judgment against the defendant as follows:

1. The Court declare the rights and other legal relation of the plaintiff and defendant in the marriage contract

(Ketubah) created by reason on the written instrument dated May 22, 1966 and annexed to the Complaint herein as Exhibit A.

2. Declare that the defendant specifically perform pursuant to the terms and conditions of said contract in that he appear before the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives pursuant to the request of the plaintiff.

3. That the failure of defendant to appear for the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives constitutes a breach of contract.

4. A reasonable provision be made providing for reasonable counsel fees for counsel to plaintiff.

5. The plaintiff have such other and further relief as the Court may seem just and proper on the premises.

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APPENDIX E

ENGLISH LANGUAGE TRANSLATION OF THE KETUBAH

EXHIBIT A-1 TO THE COMPLAINT

ON THE FIRST DAY OF THE WEEK, THE 3rd DAY OF THE MONTH SIVAN, 5726, CORRESPONDING TO THE 22nd DAY OF May, 1966, BOAZ AVITZUR, THE BRIDEGROOM, AND SUSAN ROSE WIEDER, THE BRIDE, WERE UNITED IN MARRIAGE IN OLD WESTBURY, N.Y., THE BRIDEGROOM MADE THE FOLLOWING DECLARATION TO HIS BRIDE: "BE THOU MY WIFE ACCORDING TO THE LAW OF MOSES AND ISRAEL. I SHALL HONOR AND SUPPORT THEE, FAITHFULLY I SHALL CHERISH THEE AND PROVIDE FOR THY NEEDS, EVEN AS JEWISH HUSBANDS ARE REQUIRED TO DO BY OUR RELIGIOUS LAW AND TRADITION."

IN TURN, THE BRIDE TOOK UPON HERSELF THE DUTIES OF A JEWISH WIFE, TO HONOR AND CHERISH HER HUSBAND, AND TO CARRY OUT ALL HER OBLIGATIONS TO HIM IN FAITHFULNESS AND AFFECTION AS JEWISH LAW AND TRADITION PRESCRIBE.

AND IN SOLEMN ASSENT TO THEIR MUTUAL RESPONSIBILITIES AND LOVE, THE BRIDEGROOM AND BRIDE HAVE DECLARED: AS EVIDENCE OF OUR DESIRE TO ENABLE EACH OTHER TO LIVE IN ACCORDANCE WITH THE JEWISH LAW OF MARRIAGE THROUGHOUT OUR LIFETIME, WE, THE BRIDE AND BRIDEGROOM, ATTACH OUR SIGNATURES TO THIS KETUBAH, AND HEREBY AGREE TO RECOGNIZE THE BETH DIN OF THE RABBINICAL ASSEMBLY AND THE JEWISH THEOLOGICAL SEMINARY OF AMERICA, OR ITS DULY APPOINTED REPRESENTATIVES, AS HAVING AUTHORITY TO COUNSEL US IN THE LIGHT OF JEWISH TRADITION WHICH REQUIRES HUSBAND AND WIFE TO GIVE EACH OTHER COMPLETE LOVE AND DEVOTION, AND TO SUMMON EITHER PARTY AT THE REQUEST OF THE OTHER, IN ORDER TO ENABLE THE PARTY SO REQUESTING TO LIVE IN ACCORDANCE WITH THE STANDARDS OF THE JEWISH LAW OF MARRIAGE THROUGHOUT HIS OR HER LIFETIME. WE AUTHORIZE THE BETH DIN

TO IMPOSE SUCH TERMS OF COMPENSATION AS IT MAY SEE FIT FOR FAILURE TO RESPOND TO ITS SUMMONS OR TO CARRY OUT ITS DECISION. THIS KETUBAH WAS EXECUTED AND WITNESSED THIS DAY IN ACCORDANCE WITH JEWISH LAW AND TRADITION.

s/ Boaz Avitzur BRIDEGROOM

s/ Susan Wieder BRIDE

s/ Melvin Kieffer RABBI

s/ Abraham Weisman WITNESS

s/ Melvin Kieffer WITNESS

82-1354

Office - Supreme Court, U.S.
FILED
JUL 15 1983

No. 82——

IN THE

Supreme Court of the United States

October Term, 1982

BOAZ AVITZUR,

Petitioner,

v.

SUSAN ROE AVITZUR,

Respondent.

Brief in Opposition to the Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether the jurisdiction of this Court should be invoked pursuant to 28 U.S.C. §1257(3).

II. Whether enforcement of a provision of a prenuptial agreement requiring arbitration of any controversy between the petitioner and respondent by a specified rabbinical tribunal is constitutionally cognizable.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82 -

BOAZ AVITZUR,

Petitioner,

v.

SUSAN ROE AVITZUR,

Respondent.

BRIEF IN OPPOSITION FOR THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

Susan R. Avitzur hereby submits this brief in opposition to the petition of Boaz Avitzur for a writ of certiorari to review the order of the Court of Appeals of the State of New York which held that plaintiff stated a cause of action in her complaint and as such, reversed the order of the New York State

Supreme Court, Appellate Division, Third Department which held that respondent had not stated a cause of action in her complaint.

OPINIONS BELOW

The opinion of the New York State Court of Appeals (App. A, A1-A14) is reported at 58 N.Y. 2d 108. The opinion of the New York State Supreme Court, Appellate Division, Third Department (App. B, B1-B5) is reported at 86 A.D. 2d 133. The opinion of the New York State Supreme Court, Special Term (App. C, C1-C8) is not reported.

JURSIDICTION

It is respectfully submitted that the jurisdiction of this Court may not be invoked pursuant to 28 U.S.C. § 1257(3) for the reason that no final judgment or decree has been rendered by the New York State Court of Appeals in the matter at bar.

STATEMENT OF THE CASE

Respondent submits this abridged statement in conformance with Rule 34(2) of this Court in order to correct inaccuracies and omissions in the statement of the case submitted by petitioner.

Respondent seeks to compel specific performance of the prenuptial agreement entered into by the parties.

1. Petitioner and respondent were married in Westbury, New York on May 22, 1966 (A4). Prior to the marriage ceremony, the parties entered into a written contract with both a Hebrew/Aramaic and an English text, known as a "Ketubah" (A4), whereby the petitioner and respondent agreed in part as follows:

> . . . As evidence of our desire to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom . . . hereby agree to

> recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

(E2-E3)

The contract executed by the parties constitutes an adaptation by the Conservative movement (as opposed to Orthodox or Reform) of Judaism and provides for submission of religious divorce disputes to a rabbinical arbitration tribunal known as a "Beth Din" (A5).

Respondent requested that the petitioner appear before the Beth Din pursuant to the terms of the contract solely for the purpose of convening the Beth Din, but the respondent

refused and continues to refuse to submit the jurisdiction of this arbitration panel. Until such time as the petitioner appears, the respondent is not considered divorced and may not remarry pursuant to Jewish law. While petitioner was granted an uncontested decree of divorce on May 16, 1978 (A5), all questions of child support and custody of the infant issue of the marriage were referred to the Albany County Family Court which concluded that the best interests and welfare of the infant issue, Michael Avitzur would be best served by awarding custody of the infant to respondent (B5).

2. Respondent commenced an action seeking specific performance of the prenuptial agreement made by petitioner in which he agreed with respondent to appear before the designated arbitration panel, where petitioner may assert any defense of his pleasure.

Petitioner moved for an order seeking to dismiss the complaint upon the ground that respondent had failed to state a cause of action in her complaint. Respondent filed a cross-motion for summary judgment. At a Special Term of the Supreme Court of the State of New York, Justice Aaron E. Klein denied the motion of petitioner to dismiss the complaint and further denied the cross-motion of respondent for summary judgment by decision and order (C1-8, D1-4).

3. Petitioner appealed from the Order of Special Term. The Appellate Division of Supreme Court of the State of New York, Third Department modified the decision and order of Special Term, by modifying so much of the Order of Special Term as denied petitioner's motion to dismiss the complaint.

Respondent appealed from the Order of the Appellate Division, Third Department to the

Court of Appeals of the State of New York which reversed the Order of the Appellate Division, holding that plaintiff had stated a cause of action in her complaint and remanded the case for trial to the Supreme Court. In its decision the Hon. Sol Wachtler stated for the Court as follows:

> "It is clear that judicial involvement in matters touching upon religious concerns has been constitutionally limited in analogous situations, and courts should not resolve such controversies in a manner requiring consideration of religious doctrine (Presbyterian Church v. Hull Church, 393 US 440, 449; Serbian Orthodox Diocese v. Milivoievich. 426 US 696, 709; Jones v. Wolf, 443 US 595, 603; see e.g., Reardon v. Lemoyne, __, NH __, __ [Dec. 23, 1982]). In its most recent pronouncement on this issue, however, the Supreme Court, in holding that a State may adopt any approach to resolving religious disputes which does not entail consideration of doctrinal matters, specifically approved the use of the "neutral principles of law" approach as consistent with constitutional limitations (Jones v. Wolf, supra, at p. 602). This approach contemplates the application of objective,

well-established principles of secular law to the dispute (id., at p. 603), thus permitting judicial involvement to the extent that it can be accomplished in purely secular terms.

The present case can be decided solely upon application of neutral principles of contract law, without reference to any religious principle. Consequently, defendant's objections to enforcement of his promise to appear before the Beth Din, based as they are upon the religious origin of the agreement, pose not constitutional barrier to the relief sought by plaintiff. . . .

In short, the relief sought by plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself. In this regard, no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result. Certainly nothing the Beth Din can do would in any way effect the civil divorce." (A7-8)

I

PETITIONER IMPROPERLY INVOKES THE JURISDICTION OF THIS COURT UNDER 28 U.S.C. §1257(3)

Either by design or error, petitioner improperly labels the Order of the Court of Appeals of the State of New York as a final

judgment. A judicious review of each of the orders of the courts below (see Appendices A, D and E) document that each tribunal executed and issued an order. It is petitioner, seeking to invoke the jursidiction of this Court, who affixes an imprimatur of "judgment" upon each "order" of the courts below.

In New York practice, procedurally and substantively, the terms "order" and "judgment" are neither synonymous nor interchangeable. It is well-settled hornbook law that judgments are distinguishable from orders. An order is a decision on a motion made at some step in the action or proceeding, while a judgment is a determination of the rights of the parties, which may be either interlocutory or final. 8 Carmody-Wait 2d, Judgments, §63:2 at pg. 625. As Judge Wachtler stated for the Court of Appeals, "Special Term denied defendant's (petitioner) motion to dismiss, ... " (A6).

It is clear in the matter at bar that jurisdiction of this Court may not be invoked pursuant to 28 U.S.C 1257(3). The Order of the Court of Appeals of the State of New York has not fully adjudicated the rights of the parties as no judgment or decree, much less final, has been entered. The Court of Appeals has simply held that respondent stated a cause of action requiring a plenary at trial of the issues raised by her complaint.

There being no final judgment or decree, petitioner is barred from invoking 28 U.S.C 1257(3) to obtain review by this Court. N.Y. Times Co. v. Jascalevich, 439 U.S. 1317(1978); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981); Minnick v. California Department of Corrections, 452 U.S. 105 (1981).

No plenary trial has been conducted nor is respondent assured of obtaining specific

performance. Furthermore, petitioner may assert any constitutional defense and preserve same for appellate review should he be unsuccessful at trial. There being no final judgment or decree, 28 U.S.C. §1257(3) is improperly invoked by petitioner. Costarelli v. Massachusetts, 421 U.S. 193 (1975); Flynt v. Ohio, 451 U.S. 619 (1981).

II

ENFORCEMENT OF THE PARTIES ARBITRATION CLAUSE IN THE PRENUPTIAL AGREEMENT DOES NOT INVOLVE THE COURT IN RELIGIOUS ENTANGLEMENT

The Court below decided it is entirely permissable and appropriate for Courts to utilize a "neutral principles" doctrine by which the judiciary does not decide questions of religious law, but enforces neutrally the principles of law which apply generally to disputes which contain no religious component. Jones v. Wolf, 443 U.S. 595, 602-06 (1979); Maryland and Virginia Churches v. Sharpsburg Church, 396 U.S. 367 (1970).

In the matter at bar, the Court of Appeals has applied contract principles to define the joint commitment that the parties made to proceed with arbitration should be enforced as with any totally secular agreement to arbitrate. A Court can thereafter confirm and carry out the decision of the arbitration panel, so long as the Court makes no inquiry into, or resolution of, any doctrinal matter.

An agreement to submit to arbitration in which the arbitrator constitute an ecclesiastical tribunal, do not raise a question under the religion cause of the First Amendment of the constitution. Hurwitz v. Hurwitz, 216 A.D. 362; Zimbler v. Felber, 445 N.Y.S. 2d 366; Paramount Novelty Corp. v. Markovitz, N.Y.L.J., Nov. 10, 1981 at p. 11, Col. 2. There is nothing in the First Amendment of the United States Constitution forbidding parties

before an ecclesiastical body to resolve that dispute and a decision of the ecclestical tribunal is valid, enforceable, and binding. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

It is becoming increasingly common to provide for arbitration of differences between individuals who were formally husband and wife. Bowmer v. Bowmer, 50 N.Y. 2d 288. Enforcement of the provision of the marriage contract requiring arbitration of a dispute before the rabbinical tribunal in the matter at bar is constitutionally indistinguishable from compelling performance of a similar provision incorporated in a separation agreement. Koeppel v. Koeppel, 3 A.D. 2d 853; Margulies v. Margulies, 42 A.D. 2d 517; Rubin v. Rubin, 75 Misc. 2d 776, 348 N.Y.S. 2d 61; Waxstein v. Waxstein, 90 Misc. 2d 784, aff'd 57 A.D. 2d 863; Shapiro v. Shapiro, 88 A.D. 2d 592. The enforcement of the provisions of the

ketubah as a contract is as constitutionally cognizable as the enforcement of a provision requiring appearance before an eccelesiastical tribunal embodied and incorporated in the text of a valid separation agreement. Stern v. Stern, N.Y.L.J. Aug. 8, 1979, p. 13, Col. 5 (Sup. Ct., Kings County 1979); Minkin v. Minkin, 180 N.J. Super. 260, 434 A. 2d 665 (Ch. Div. 1981).

No Court can be asked to determine the religious obligations "in light of jewish tradition" of a husband and wife "to enable either of them to live with the standards of the jewish law of marriage throughout his or her lifetime." (A5). To that extent the dispute in this case between petitioner and respondent are nonjusticiable. However, the parties are not prevented from making the dispute arbitrable. If the parties are unable to resolve their differences before a

rabbinical tribunal, they will be effectively deprived of any forum for resolution of these disputes.

Respondent has no guarantee, nor seeks one, that she shall be successful upon a plenary trial or before the eccelesiastical tribunal. However, foreclosing to respondent the right to seek specific performance of the contractual agreement forecloses her ability to seek enforcement of the contract. Specific performance is a judicial remedy to right a secular wrong. The Court of Appeals has simply given cognizance to respondent's claim that she is entitled to a judicial forum.

It is well settled that the institution of marriage is fundamentally subject to state involvement as a matter of public policy and public interest. This Court has previously stated that the right to marry and raise a family are among the most fundamental civil

rights guaranteed to members of a free and democratic society. Meyer v. Nebraska, 262 U.S. 290; Griswold v. Connecticut 381 U.S. 479. Respondent should not be denied a forum to hear her claim and deny her the ability to avail herself of these fundamentally guaranteed civil rights in the future if she should so choose.

CONCLUSION

For the reasons stated, the relief sought by the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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Dated: July 11, 1983

APPENDIX A

OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUSAN R. AVITZUR, Appellant, v BOAZ AVITZUR, Respondent.

Argued January 3, 1983; decided February 15, 1983

SUMMARY

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 21, 1982, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (AARON E. KLEIN, J.), entered in Albany County, denying defendant's motion to dismiss the complaint and plaintiff's cross motion for summary judgment. The modification consisted of reversing so much of the order as denied defendant's motion to dismiss the complaint and granting the motion.

Plaintiff and defendant were married in 1966 in a ceremony conducted in accordance with Jewish tradition. Prior to the marriage ceremony, the parties signed a document known as a "Ketubah", in which they both agreed to recognize the "Beth Din", a rabbinical tribunal, as having authority to counsel the couple in matters concerning their marriage. In 1978, the defendant husband was granted a civil divorce upon the ground of cruel and inhuman treatment, but, notwithstanding this civil divorce, the wife is not considered divorced and may not remarry pursuant to Jewish law, until such a time as a Jewish divorce decree, known as a "Get", is granted. A Get may be obtained only after the husband and wife appear before the Beth Din, and plaintiff sought to summon defendant before this tribunal pursuant to the provisions of the Ketubah. After defendant refused to appear, plaintiff brought this action seeking an order compelling defendant's specific performance of the Ketubah's requirement that he appear before the Beth Din. Defendant moved to dismiss upon the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a cause of action. Special Term denied defendant's motion to dismiss and also denied plaintiff summary judgment. The Appellate Division modified and granted defendant's motion to dismiss, concluding that the document constituted a liturgical agreement, unenforceable where the State, having granted a civil divorce, has no further interest in the parties' marital status.

The Court of Appeals reversed and denied defendant's motion to dismiss the complaint, holding, in an opinion by Judge WACHTLER, that nothing in law or public policy prevents judicial recognition and enforcement of the secular terms of a religious marriage agreement.

Avitzur v Avitzur, 86 AD2d 133, reversed.

HEADNOTE

Husband and Wife — Divorce — Agreement to Secure Religious Dissolution of Marriage

Nothing in law or public policy prevents judicial recognition and enforcement of the secular terms of an agreement, known as a "Ketubah", which was entered into as part of a religious marriage ceremony. The provisions of the Ketubah, whereby defendant husband promised that he would appear before a religious tribunal known as a "Beth Din" for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a "Get", a Jewish religious divorce, constitute nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum, and are thus closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. Nor would enforcement of the terms of the Ketubah by a civil court violate the constitutional prohibition against excessive entanglement between church and State on the ground that the court must necessarily intrude upon matters of religious doctrine and practice, since this dispute can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle; the fact that all of the Ketubah's provisions may not be judicially recognized does not prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a nonjudicial forum.

POINTS OF COUNSEL

Richard A. Hanft for appellant. I. Execution and enforcement of the marriage contract does not constitute entanglement in a religious question. (*Matter of "Rubin" v "Rubin"*, 75 Misc 2d 776; *Matter of Blum Folding Paper Box Co. [Raften — Friedlander]*, 27 NY2d 35; *Board of Educ. [Auburn Teachers Assn.]*, 49 AD2d 35.) II. Appellant has stated a cause of action warranting a plenary trial. (*Jones v Wolf*, 443 US 595; *Hurwitz v Hurwitz*, 216 App Div 362; *Serbian Orthodox Diocese v Milivojevich*, 426 US 696; *Beulah Wesleyan Methodist Church v Henry*, 187 Misc 502; *Koeppel v Koeppel*, 3 AD2d 853; *Margulies v Margulies*, 42 AD2d 517; *Waxstein v Waxstein*, 90 Misc 2d 784, 57 AD2d 863; *Shapiro v Shapiro*, 110 Misc 2d 726; *Perlstein v Perlstein*, 76 AD2d 49.) III. Application of the doctrine of "unclean hands" is properly a matter for a Trial Judge. (*Da Silva v Musso*, 53 NY2d 543; *Meyer v Nebraska*, 262 US 390; *Griswold v Connecticut*, 381 US 479.)

Louis-Jack Pozner for respondent. I. New York civil courts may not properly adjudicate religious issues. (*McCollum v Board of Educ.*, 333 US 203; *Presbyterian Church v Hull Church*, 393 US 440; *Jones v Wolf*, 443 US 595; *Sherbert v Verner*, 374 US 398; *Russian Church of Our Lady of Kazan v Dunkel*, 33 NY2d 456.) II. This action was properly dismissed for failure of the complaint to state a cause of action. (*Sivakoff v Sivakoff*, 280 App Div 106; *Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310.) III. Summary judgment was properly granted to respondent dismissing the complaint. (*Margulies v Margulies*, 42 AD2d 517; *Pal v Pal*, 45 AD2d 738; *Waxstein v Waxstein*, 90 Misc 2d 784; *Koeppel v Koeppel*, 3 AD2d 853.) IV. Appellant's relief is barred by laches. (*Sherbert v Verner*, 374 US 398; *Elrod v Burns*, 427 US 347; *Wisconsin v Yoder*, 406 US 205.) V. New York State has pre-empted the field of divorce by the statutory scheme of the Domestic Relations Law, and the cause of action which appellant attempts to assert herein is not properly cognizable by the courts of the State of New York.

Nathan Lewin, Dennis Rapps, Daniel D. Chazin and *Ivan L. Tillem* for National Jewish Commission on Law and Public Affairs, *amicus curiae*. I. A prenuptial agreement to submit to rabbinical arbitration any controversy between husband and wife regarding "the standards of the Jewish law of marriage" is enforceable under CPLR 7501. (*Matter of Grayson-Robinson Stores [Iris Constr. Corp.]*, 8 NY2d 133; *Lawrence Co. v Devonshire Fabrics*, 271 F2d 402; *Matter of Weinrott [Carp]*, 32 NY2d 190; *Bowmer v Bowmer*, 50 NY2d 288; *Hirsch v Hirsch*, 37 NY2d 312; *Sheets v Sheets*, 22 AD2d 176; *Grien v Grien*, 51 AD2d 543; *Siegel v Ribak*, 43 Misc 2d 7; *Board of Educ. v Cracovia*, 36 AD2d 851.) II. The parties in this case signed a binding prenuptial agreement to arbitrate any postmarital religious obligations before a specified rabbinical tribunal. (*Matter of Hub Inds. [George Mfg. Co.]*, 183 Misc 767, 269 App Div 177, 294 NY 897.) III. Enforcement of the parties' arbitration clause does not involve the court in religious entanglement. (*Hurwitz v Hurwitz*, 216 App Div 362; *Berman v Shatnes Lab.*, 43 AD2d 736; *Matter of Koslowski v Seville Syndicate*, 64 Misc 2d 109; *Matter of Berk*, 8 Misc 2d 732;

Serbian Orthodox Diocese v Milivojevich, 426 US 696; *Jones v Wolf*, 443 US 595; *Maryland & Va. Churches v Sharpsburg Church*, 396 US 367; *Margulies v Margulies*, 42 AD2d 517, 33 NY2d 894; *Matter of "Rubin" v "Rubin"*, 75 Misc 2d 776; *Waxstein v Waxstein*, 90 Misc 2d 784, 57 AD2d 863.)

Robert J. Jossen and *Stanley J. Friedman* for Jewish Theological Seminary of America, *amicus curiae*. As a matter of law there is no proscription against specific performance of the Ketubah to require defendant to submit to the jurisdiction of a Beth Din. (*Matter of Philips*, 293 NY 483, 294 NY 662; *Matter of Sunshine*, 51 AD2d 326, 40 NY2d 875; *Johnston v Spicer*, 107 NY 185; *Strebler v Wolf*, 152 Misc 859; *Hurwitz v Hurwitz*, 216 App Div 362; *Perlstein v Perlstein*, 76 AD2d 49; *Margulies v Margulies*, 42 AD2d 517; *Waxstein v Waxstein*, 90 Misc 2d 784, 57 AD2d 863; *Matter of "Rubin" v "Rubin"*, 75 Misc 2d 776, *Koeppel v Koeppel*, 3 AD2d 853.)

OPINION OF THE COURT

WACHTLER, J.

This appeal presents for our consideration the question of the proper role of the civil courts in deciding a matter touching upon religious concerns. At issue is the enforceability of the terms of a document, known as a Ketubah, which was entered into as part of the religious marriage ceremony in this case. The Appellate Division held this to be a religious covenant beyond the jurisdiction of the civil courts. However, we find nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of such an agreement. There should be a reversal.

Plaintiff and defendant were married on May 22, 1966 in a ceremony conducted in accordance with Jewish tradition. Prior to the marriage ceremony, the parties signed both a Hebrew/Aramaic and an English version of the "Ketubah". According to the English translation, the Ketubah evidences both the bridegroom's intention to cherish and provide for his wife as required by religious law and tradition and the bride's willingness to carry out her obligations to her husband in faithfulness and affection according to Jewish law and tradition. By signing the Ketu-

bah, the parties declared their "desire to * * * live in accordance with the Jewish law of marriage throughout [their] lifetime" and further agreed as follows: "[W]e, the bride and bridegroom * * * hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision."

Defendant husband was granted a civil divorce upon the ground of cruel and inhuman treatment on May 16, 1978. Notwithstanding this civil divorce, plaintiff wife is not considered divorced and may not remarry pursuant to Jewish law, until such time as a Jewish divorce decree, known as a "Get", is granted. In order that a Get may be obtained plaintiff and defendant must appear before a "Beth Din", a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law. Plaintiff sought to summon defendant before the Beth Din pursuant to the provision of the Ketubah recognizing that body as having authority to counsel the couple in the matters concerning their marriage.

Defendant has refused to appear before the Beth Din, thus preventing plaintiff from obtaining a religious divorce. Plaintiff brought this action, alleging that the Ketubah constitutes a marital contract, which defendant has breached by refusing to appear before the Beth Din, and she seeks relief both in the form of a declaration to that effect and an order compelling defendant's specific performance of the Ketubah's requirement that he appear before the Beth Din. Defendant moved to dismiss the complaint upon the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a cause of action, arguing that resolution of the dispute and any grant of relief to plaintiff would involve the civil court in

impermissible consideration of a purely religious matter. Plaintiff, in addition to opposing the motion, cross-moved for summary judgment.

Special Term denied defendant's motion to dismiss, noting that plaintiff sought only to compel defendant to submit to the jurisdiction of the Beth Din, an act which plaintiff had alleged defendant bound himself to do. That being the only object of the lawsuit, Special Term was apparently of the view that the relief sought could be granted without impermissible judicial entanglement in any doctrinal issue. The court also denied plaintiff's motion for summary judgment, concluding that issues concerning the translation, meaning and effect of the Ketubah raised factual questions requiring a plenary trial.

The Appellate Division modified, granting defendant's motion to dismiss. Inasmuch as the Ketubah was entered into as part of a religious ceremony and was executed, by its own terms, in accordance with Jewish law, the court concluded that the document constitutes a liturgical agreement. The Appellate Division held such agreements to be unenforceable where the State, having granted a civil divorce to the parties, has no further interest in their marital status.

Accepting plaintiff's allegations as true, as we must in the context of this motion to dismiss, it appears that plaintiff and defendant, in signing the Ketubah, entered into a contract which formed the basis for their marriage. Plaintiff has alleged that, pursuant to the terms of this marital contract, defendant promised that he would, at plaintiff's request, appear before the Beth Din for the purpose of allowing that tribunal to advise and counsel the parties in matters concerning their marriage, including the granting of a Get. It should be noted that plaintiff is not attempting to compel defendant to obtain a Get or to enforce a religious practice arising solely out of principles of religious law. She merely seeks to enforce an agreement made by defendant to appear before and accept the decision of a designated tribunal.

Viewed in this manner, the provisions of the Ketubah relied upon by plaintiff constitute nothing more than an agreement to refer the matter of a religious divorce to a

nonjudicial forum. Thus, the contractual obligation plaintiff seeks to enforce is closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. There can be little doubt that a duly executed antenuptial agreement, by which the parties agree in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable (e.g., *Matter of Sunshine*, 40 NY2d 875, affg 51 AD2d 326; *Matter of Davis*, 20 NY2d 70). Similarly, an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity (*Hirsch v Hirsch*, 37 NY2d 312; see *Bowmer v Bowmer*, 50 NY2d 288, 293). This agreement — the Ketubah — should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor the public policy of this State (*Hirsch v Hirsch, supra*, at p 315).

Defendant argues, in this connection, that enforcement of the terms of the Ketubah by a civil court would violate the constitutional prohibition against excessive entanglement between church and State, because the court must necessarily intrude upon matters of religious doctrine and practice. It is urged that the obligations imposed by the Ketubah arise solely from Jewish religious law and can be interpreted only with reference to religious dogma. Granting the religious character of the Ketubah, it does not necessarily follow that any recognition of its obligations is foreclosed to the courts.

It is clear that judicial involvement in matters touching upon religious concerns has been constitutionally limited in analogous situations, and courts should not resolve such controversies in a manner requiring consideration of religious doctrine (*Presbyterian Church v Hull Church*, 393 US 440, 449; *Serbian Orthodox Diocese v Milivojevich*, 426 US 696, 709; *Jones v Wolf*, 443 US 595, 603; see, e.g., *Reardon v Lemoyne*, __ NH __, __ [Dec. 23, 1982]). In its most recent pronouncement on this issue, however, the Supreme Court, in holding that a State may adopt any approach to resolving religious disputes which does not entail consideration of doctrinal matters, specifically approved the use of the "neutral principles of law" approach as consistent with

constitutional limitations (*Jones v Wolf, supra*, at p 602). This approach contemplates the application of objective, well-established principles of secular law to the dispute (*id.*, at p 603), thus permitting judicial involvement to the extent that it can be accomplished in purely secular terms.

The present case can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle. Consequently, defendant's objections to enforcement of his promise to appear before the Beth Din, based as they are upon the religious origin of the agreement, pose no constitutional barrier to the relief sought by plaintiff The fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable. Solemnization of the marital relationship often takes place in accordance with the religious beliefs of the participants, and this State has long recognized this religious aspect by permitting duly authorized pastors, rectors, priests, rabbis and other religious officials to perform the ceremony (Domestic Relations Law, § 11, subds 1, 7). Similarly, that the obligations undertaken by the parties to the Ketubah are grounded in religious belief and practice does not preclude enforcement of its secular terms. Nor does the fact that all of the Ketubah's provisions may not be judicially recognized prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a nonjudicial forum (see *Ferro v Bologna*, 31 NY2d 30, 36). The courts may properly enforce so much of this agreement as is not in contravention of law or public policy.

In short, the relief sought by plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself. In this regard, no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result. Certainly nothing the Beth Din can do would in any way affect the civil divorce. To the extent that an enforceable promise can be found by the application of neutral principles of contract law, plaintiff will have demonstrated entitlement to the relief sought. Consideration of other substantive issues bearing upon plaintiff's entitlement to a religious divorce, however, is

appropriately left to the forum the parties chose for resolving the matter.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendant's motion to dismiss the complaint denied.

JONES, J. (dissenting). We are of the opinion that to grant the relief plaintiff seeks in this action, even to the limited extent contemplated by the majority, would necessarily violate the constitutional prohibition against entanglement of our secular courts in matters of religious and ecclesiastical content. Accordingly, we would affirm the order of the Appellate Division.

We start on common ground. Judicial intervention in disputes with respect to religious and ecclesiastical obligation is constitutionally proscribed, save with respect to a narrow class of issues, as to which, under "neutral principles of law", the secular component of the religious and ecclesiastical rights and obligations may be resolved without impermissible trespass on or even reference to religious dogma and doctrine (pp 114-115). We depart from the conclusion of the majority that in this case the courts may discern one or more discretely secular obligations which may be fractured out of the "Ketubah", indisputably in its essence a document prepared and executed under Jewish law and tradition.

We are constrained, as is the majority, by the allegations of the complaint. Plaintiff therein alleges: that the parties were married on May 22, 1966 in a religious ceremony in accordance with Jewish law and tradition; that pursuant to the terms and conditions of the religious ceremony they entered into a contract known as a "Ketubah"; that under the Ketubah the husband declared and contracted with the wife to be her husband according to the law of Moses and Israel and to honor and support her, faithfully cherishing her and providing for her needs as Jewish husbands are required to do pursuant to Jewish religious law and tradition; that pursuant to the Ketubah the parties agreed to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America as having authority to summon either party at the request of the other

and further agreed that in the event of any civil divorce decree the husband would grant and the wife accept a Jewish divorce ("get") in accordance with the authority vested in the Beth Din; that under the law of Moses should the husband arbitrarily refuse to give a "get" the wife, such as plaintiff in this case, is known and referred to as an "Aguna" which is a state of limbo wherein the wife is considered neither married nor divorced; that a judgment of civil divorce of the parties was entered on May 16, 1978 in the Albany county clerk's office; that the wife has requested and summoned the husband to appear before the Beth Din of the Rabbinical Assembly pursuant to the terms of the Ketubah but that he has willfully and intentionally refused to appear before the assembly in violation of his contractual obligations; that in consequence the wife is consigned to the status of "Aguna" and is barred from remarrying within the context of a Jewish religious ceremony. The wife demands judgment against the husband: declaring "the rights and other legal relation of the plaintiff and defendant in the marriage contract (Ketubah), created by reason of the written instrument"; declaring that the husband specifically perform pursuant to the terms and conditions of the Ketubah in that he appear before the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives pursuant to the wife's request; declaring that failure of the husband so to appear constitutes a breach of contract; and for other incidental relief.

Determination whether judicial relief may be granted the wife without constitutionally impermissible interjection of the court into matters of religious and ecclesiastical content requires examination of the English translation of the Ketubah in the context of the wife's allegation that this document was made and entered into as part of the religious ceremony in accordance with Jewish law and tradition:

"On the First Day of the Week, the 3rd Day of the Month Sivan, 5726, corresponding to the 22nd Day of May, 1966, Boaz Avitzur, the bridegroom, and Susan Rose Wieder, the bride, were united in marriage in Old Westbury, N.Y. The bridegroom made the following declaration to his bride: 'Be

thou my wife according to the law of Moses and Israel. I shall honor and support thee, faithfully I shall cherish thee and provide for thy needs, even as Jewish husbands are required to do by our religious law and tradition.'

"In turn, the bride took upon herself the duties of a Jewish wife, to honor and cherish her husband, and to carry out all her obligations to him in faithfulness and affection as Jewish law and tradition prescribe.

"And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: As evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom, attach our signatures to this Ketubah, and hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

"This Ketubah was executed and witnessed this day in accordance with Jewish law and tradition.

"Boaz Avitzur bridegroom Susan Wieder bride Melvin Kieffer rabbi Abraham Weisman witness Melvin Kieffer witness."

At the outset we observe that the complaint contains no allegation that the parties intended that the Ketubah should manifest secular promises or have any civil or secular status or any legal significance independent of the religious ceremony between them of which it was an integral part. Nor is any such assertion advanced in the papers submitted by the wife in support of her cross motion for summary judgment.

Moreover, it appears evident to us that any determination of the content and particulars of the rights of the wife

or the obligations of the husband under this document cannot be made without inquiry into and resolution of questions of Jewish religious law and tradition. We think it inaccurate to identify the relief sought by plaintiff, as does the majority, as "simply to compel defendant to perform a secular obligation to which he contractually bound himself." (At p 115.)

The complaint's first request for relief paints with a broad brush, asking that the court "declare the rights and other legal relation of the plaintiff and defendant in the marriage contract" created by reason of the Ketubah. That such an all-encompassing declaration of rights exceeds the authority of the civil court seems to be implicitly conceded by the majority's attempt to limit its consideration to enforcement of an obligation characterized as "secular" — the alleged obligation of the husband to appear before the Beth Din.

The wife's pleading itself, however, not to mention the affidavits submitted by her, makes it clear that even a definition of the purported "secular obligation" requires an examination into the principles and practice of the Jewish religion. Although the English translation of the Ketubah attached to the complaint recites that the parties "recognize the Beth Din * * * as having authority * * * to summon either party at the request of the other", the complaint seeks a declaration that the husband specifically perform "in that he appear before the Beth Din * * * pursuant to the request of the plaintiff". Thus, the wife tenders her construction of the document, which in turn presumably is predicated on what she contends is tradition in the faith, i.e., that there is an obligation imposed by the agreement to appear before the Beth Din at the summons alone of the other party to the marriage despite the facial reference to a summons by the Beth Din. The husband, tendering his own construction of the document, denies that he is under any obligation to appear before the Beth Din because an earlier request by him for convocation of such a body was refused. Thus, it appears evident that any judicial determination whether the husband is obligated to appear before the Beth Din, or what nature of summons is required to call such

obligation into play, necessarily involves reference to substantive religious and ecclesiastical law.*

The unsoundness of the position espoused by the majority to justify judicial action to compel the husband to appear before the Beth Din, is revealed by projection of the course the continuing litigation will take in this case. The motion to dismiss and the cross motion for summary judgment having both been denied, the case will be set down for trial. The evidence which the wife may be expected to introduce is revealed by examination of the affidavits she submitted in opposition to the motion to dismiss and in support of her cross motion for summary judgment. Her affidavit conveys information furnished her by Rabbi Mordecai Kieffer who in his accompanying affidavit describes himself as "qualified to render an expert opinion concerning matters of Jewish laws and custom". She relies on his affidavit to support her claim that there was "good and legal consideration" for the Ketubah and that the Beth Din presently has no authority to compel the husband to submit to its jurisdiction. The rabbi, predicated on what he offers as a more accurate translation of the Ketubah into English, expresses the opinion that "good and legal consideration" is to be found in the document itself. Then, describing in detail the procedures incident to the issuance of a "get", the rabbi concludes that the husband was obligated to submit to the jurisdiction of the Beth Din without the issuance of any summons by it. Accordingly, it is evident that the wife and her counsel are themselves of the view that substantiation of her position will depend on expert opinion with respect to Jewish law and tradition.

The majority's reference to the fact that marriage relationships solemnized within a religious context are recognized by the civil law is not determinative of the question here presented where what is sought to be enforced is an aspect of the relationship peculiar to the religion within which the ceremony creating it took place. No authority is cited in which a civil court has enforced a concomitant undertaking required by the ecclesiastical authority under which the marriage ceremony was solemnized. That no

* The recital in the testimonium clause itself is indicative — "this Ketubah was executed and witnessed this day in accordance with Jewish law and tradition."

such civil enforcement of the obligation to appear before the Beth Din was contemplated either by the drafter of the Ketubah or by the parties as its signatories is evident from the inclusion of explicit authorization to the Beth Din "to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision". Nothing in the record suggests that it was the intention of the parties when they signed this religious document that the civil courts of the State of New York were to have jurisdiction to determine the substantive rights created thereby or to invoke civil procedures and remedies for the enforcement of such rights. Indeed, any conclusion on the part of our courts that this express provision was not intended by the parties as the exclusive remedy available to them for any breach of their obligations under the Ketubah would itself necessarily entail examination of Jewish law and tradition.

Finally, the evident objective of the present action — as recognized by the majority and irrefutably demonstrated by the complaint — even if procedural jurisdiction were to be assumed, is to obtain a religious divorce, a matter well beyond the authority of any civil court. (Again supplying her own interpretation of the Ketubah, the wife alleges: "That pursuant to the terms of the Ketubah, the plaintiff and defendant agreed that in the event of any civil divorce decree that the husband grant and the wife accept a Jewish divorce decree in accordance with the authority vested in the Beth Din of the Rabbinical Assembly".) As was noted at the Appellate Division, the interest of the civil authorities of the State of New York in the status of the marriage between these parties was concluded when the final judgment of divorce was entered in 1978.

Chief Judge COOKE and Judges FUCHSBERG and MEYER concur with Judge WACHTLER; Judge JONES dissents and votes to affirm in a separate opinion in which Judges JASEN and SIMONS concur.

Order reversed, etc.

APPENDIX B

OPINION OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

SUSAN R. AVITZUR, Respondent, v BOAZ AVITZUR, Appellant.

Third Department. April 8, 1982

SUMMARY

APPEAL from an order of the Supreme Court at Special Term (AARON E. KLEIN, J.), entered January 8, 1981 in Albany County, which denied defendant's motion to dismiss the complaint.

HEADNOTE

Husband and Wife — Divorce — Agreement to Secure Religious Dissolution of Marriage

Plaintiff and defendant, who had been married in a Jewish religious ceremony and signed a written agreement known as a "Ketubah" as part of the ceremony, were subsequently divorced, and plaintiff, desirous of obtaining a Jewish religious divorce, known as a "Get", commenced an action for specific performance of the Ketubah's requirement that defendant appear before a Jewish religious tribunal known as the "Beth Din", which is necessary in order to obtain a Get; defendant's motion to dismiss the complaint is granted, since the State, having already granted the parties a civil divorce, has no further interest in their marital status and a court will not enforce liturgical agreements concerning matters about which the State has no remaining concern. Moreover, a person seeking to invoke the court's equitable power of compelling specific performance should come before the court with clean hands, and plaintiff, who has had a civil divorce on fault grounds granted against her, has failed to state a cause of action for the relief sought.

APPEARANCES OF COUNSEL

Louis-Jack Pozner for appellant.

Lee, LeForestier, Malone, Smith & Hanft (*Richard A. Hanft* of counsel), for respondent.

OPINION OF THE COURT

MAHONEY, P. J.

Married in a Jewish religious ceremony on May 22, 1966, plaintiff and defendant signed a written agreement known as a "Ketubah" that same day as part of the religious ceremony. On May 17, 1978, defendant obtained a civil divorce in the State Supreme Court on the ground of plaintiff's cruel and inhuman treatment. Desirous of obtaining a Jewish religious divorce, known as a "Get", plaintiff commenced this action in February of 1980 for specific performance of the Ketubah's requirement that defendant appear before a Jewish religious tribunal known as the "Beth Din", which is necessary in order to obtain a

Get. Defendant moved to dismiss the complaint pursuant to CPLR 3211 on the grounds that plaintiff lacked capacity to sue, that the complaint failed to state a cause of action and failed to name certain necessary parties. Plaintiff cross-moved for summary judgment. Special Term denied both motions and this appeal by defendant ensued.

Defendant argues that this lawsuit involves matters which are religious in nature and that it would require an unconstitutional entanglement between church and State for the Supreme Court to assume jurisdiction over the action. Special Term, in rejecting this argument, found no such entanglement. Instead, it viewed the real object of the lawsuit as seeking "a command upon the individual defendant to do what is alleged he agreed to do in advance." We cannot agree. The agreement which plaintiff is attempting to specifically enforce was entered into as part of a religious ceremony and, by its own terms, was "executed and witnessed * * * in accordance with Jewish law and tradition." The State, having already granted the parties a civil divorce, has no further interest in their marital status. It would thus be a dangerous precedent to allow State courts to enforce liturgical agreements concerning matters about which the State has no remaining concern. Viewed in this manner, the cases cited by Special Term in support of its jurisdiction to enforce a Ketubah are inapposite since those cases involved situations where the Ketubah's terms had been incorporated in a subsequent civil agreement (*Margulies v Margulies*, 42 AD2d 517, app dsmd 33 NY2d 894 [stipulation in open court]; *Waxstein v Waxstein*, 90 Misc 2d 784, affd 57 AD2d 863 [separation agreement]; *Matter of "Rubin" v "Rubin"*, 75 Misc 2d 776 [written stipulation of settlement]; *Koeppel v Koeppel*, 138 NYS2d 366, affd 3 AD2d 853 [separation agreement]). Only the unreported case of *Stern v Stern* (Supreme Ct, Kings County, Aug. 8, 1979, HELD, J.) has granted specific performance of the Ketubah itself, as distinguished from the subsequent ratification of its provisions. We decline to follow this decision.

Moreover, assuming, *arguendo*, that this matter involved a civil contract over which State courts could properly exercise jurisdiction, it is our view that defendant's motion to dismiss for failure to state a cause of action

should have been granted. The parties to this action have already been civilly divorced. By commencing this action for specific performance of the Ketubah, plaintiff is asking the State court system to act as the enforcement mechanism whereby defendant will be compelled to appear before the Beth Din. The sole purpose behind compelling this appearance is to enable plaintiff to obtain a religious divorce so that she may at some time in the future marry in accordance with her religious beliefs.

A person seeking to invoke the court's equitable power of compelling specific performance should come before the court with clean hands (*Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 316; 20 NY Jur [rev ed], Equity, §§ 102-111). Plaintiff in the instant case has already been judicially found to have breached her marriage vows and had a divorce on fault grounds granted against her. Under these circumstances, plaintiff's complaint fails to state a cause of action for the relief being sought.

Accordingly, Special Term erred in failing to grant defendant's motion to dismiss the complaint.

The order should be modified, on the law, by reversing so much thereof as denied defendant's motion to dismiss the complaint, and the motion granted, and, as so modified, affirmed, with costs.

LEVINE, J. (dissenting). Of course, for purposes of this motion to dismiss the complaint, plaintiff's pleadings and supporting papers must be accepted as true and are entitled to every legitimate inference to be drawn therefrom. We must, therefore, accept as established (1) that there was an actual meeting of the minds between the parties as to the portion of the Ketubah in which they mutually undertook to obtain a Get in the event of a civil divorce, and that their promises were supported by consideration; (2) that defendant's involvement in obtaining the Get could be as minimal as merely appearing before a rabbi to disclose the relevant information and to execute the Get document, and thus, enforcement of this portion of the Ketubah does not entail any religious observance, performance of ritual, or invasion of personal convictions by or on the part of defendant; and (3) that defendant's refusal to

submit to the Get prevents plaintiff from the free exercise of her religion in becoming remarried in a Jewish religious ceremony.

In my view, these facts, if established at a trial, could justify some appropriate exercise of the powers of the New York State Supreme Court, sitting as a court of equity, to enforce plaintiff's contractual rights, albeit with circumspection because of the freedom of religion and separation of church and State overtones to the case.

The majority's reasoning is that because the parties have been divorced civilly and the Ketubah was entered into as part of a religious marriage ceremony, the State has no further interest in the parties' marital status and, therefore, should not "enforce liturgical agreements concerning matters about which the State has no remaining concern".

That the agreement was made as part of a religious ceremony and was executed "in accordance with Jewish law and tradition" does not render it illegal and unenforceable, and indeed to so hold would pose the same First Amendment problems the majority seeks to avoid by its decision. The direct enforcement of provisions of a Ketubah, without reaffirmation in a subsequent or separate nonliturgical agreement, was upheld in *Hurwitz v Hurwitz* (216 App Div 362). *Hurwitz'* rejection of absolute invalidity of the Ketubah as a contract, at least at the pleading stage, is equally applicable here (p 366): "All that we have before us in the present case is a simple agreement, made between a man and a woman in contemplation of marriage, and the sole questions are, what was the agreement and whether the agreement is legal. If it is, then it should be enforced according to the intent of the parties who united in making it. If it is not legal, then the courts should so declare. But I do not see how any court can render intelligent judgment in the premises until there has been a proper judicial investigation by a trial of the issues raised in the pleadings." True, *Hurwitz* involved enforcement of a portion of a Ketubah dealing with property rights during widowhood, but I should think that plaintiff's right to have her marriage finally disposed of through a religious divorce and her right to remarry in a religious ceremony are entitled to no less legal consideration. Similar interests

have been recognized as legally cognizable in other contexts (*Brillis v Brillis*, 4 NY2d 125; *Aufiero v Aufiero*, 222 App Div 479; *Rutstein v Rutstein*, 221 App Div 70).

Likewise, the fact that the parties are already civilly divorced does not preclude enforcement of the promise to submit to a Get under a valid antenuptial agreement, which the Ketubah must be deemed to constitute at this state of the litigation. As to this basis for the majority's holding, the instant case is indistinguishable from *Margulies v Margulies* (42 AD2d 517, app dsmd 33 NY2d 894) and *Waxstein v Waxstein* (90 Misc 2d 784, affd 57 AD2d 863). In both these cases, the absence of any State interest in the marital status of the parties following civil divorce did not prevent judicial enforcement of the promise subsequently to obtain a Jewish divorce. The State's interest in enforcing agreements exists no less in the case of an antenuptial agreement, i.e., the Ketubah, than in the separation agreements involved in these cases.

It is also inappropriate to dispose of plaintiff's action at the pleading stage on the basis of the clean hands doctrine, the majority's alternative ground for dismissing the complaint. We ignore the realities of modern divorce litigation by holding that the granting of an uncontested divorce to defendant, after protracted negotiations, establishes in and of itself such misconduct on plaintiff's part as to result in a total forfeiture of her contractual rights. This, too, is an issue that should only be resolved after full exploration of the relative equities of the parties at a trial.

For all of the foregoing reasons, Special Term's denial of the motion to dismiss should be affirmed.

SWEENEY, KANE and WEISS, JJ., concur with MAHONEY, P. J.; LEVINE, J., dissents and votes to affirm in a separate opinion.

Order modified, on the law, by reversing so much thereof as denied defendant's motion to dismiss the complaint, and motion granted, and, as so modified, affirmed, with costs.

APPENDIX C

OPINION OF SUPREME COURT OF THE STATE OF NEW YORK SPECIAL TERM

STATE OF NEW YORK
SUPREME COURT:COUNTY OF ALBANY

SUSAN ROE AVITZUR,

Plaintiff,

- against -

BOAZ AVITZUR,

Defendant

Sullivan County Special Term, October 10th, 1980

Motion No. 25

KLEIN, J.

Defendant's motion under CPLR §3211 seeks to dismiss this action for four stated reasons, viz, lack of capacity of the plaintiff to sue; failure to join all necessary parties in the suit; lack of jurisdiction over the subject matter by the court, and the failure of the complaint to set forth a cause of action. There is a cross-motion by which the plaintiff seeks under CPLR §3212 (b)

three forms of affirmative relief for herself, as well as denial of the relief sought by the original moving party. The relief sought by the plaintiff is partial summary judgment in the following forms: Specific performance by the defendant of the terms of a document dated May 22nd, 1966; partial summary judgment in the form of a declaratory judgment holding that the defendant has breached the terms of the said document claimed to be a contract between the parties to this action; and finally, partial summary judgment defining the relationship of the plaintiff to the action, vis-a-vis, the document so claimed to be a contractual undertaking on their parts.

The court first considers the issue raised of the jurisdiction by this court over the subject matter of the lawsuit. Defendant's contention that no such

jurisdiction exists, rests upon the claim that the lawsuit is so intertwined with religious matters that historically, beginning with the First Amendment of the Constitution of the United States and of Article I, §3 of the Constitution of the State of New York, both of which guarantee religious freedom, the courts of the State will take a hands off policy. This court takes the opposite view, that the relief sought in this suit, if the alleged contract is in fact found to be an enforceable one, would merely require a decree of this court of specific performance which would relegate the party so ordered to submit himself for a determination of religious law to a religious tribunal as purportedly agreed to by him in the basic premarital papers. By virtue of this reasoning, the court reaches the conclusion that for purposes

of establishing the legality and viability of the alleged premarital agreement, plaintiff clearly has standing before this court. Through the same stream of reasoning, the court reaches the conclusion that to require the dismissal of the complaint for failure of joinder of certain "necessary" parties, to wit, the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, would in itself trespass upon the doctrine of separation of church and state since it inevitably suggests that a civil court of law might order and command a religious tribunal to subject itself to the directions of this court. Rather, the court considers the real object of this lawsuit to be a command upon the individual defendant to do what is alleged he agreed to do in advance, namely, to submit himself to the juris-

diction of those institutions so named. It is clear that no decree of this court should have the effect of interfering in or with the religious functioning of such bodies. The view thus taken is in harmony with a line of cases decided through the years, beginning with Koeppel v. Koeppel, 138 NYS 2d 366 aff'd 3 A.D.2d 853; Margulies v. Margulies, 42 A.D.2d; 517, app. dsmd. 33 N.Y.2d 894; "Rubin" v. "Rubin", 75 Misc. 2d 776; Waxstein v. Waxstein, 90 Misc. 2d 784, and probably most recently, Stern v. Stern, NYLJ, August 8, 1979, opinion by Hon. Gerald S. Held.

While the complaint, in some of its allegations, appears to go beyond the scope of the foregoing reasoning of subject matter jurisdiction by this court, there are sufficient alternative allegations in the complaint which can basic-

ally be described as the charges of failure and refusal on the part of the individual defendant to carry out his alleged agreement through his resistance to appear before those religious bodies which support the viability of the complaint. Underlying those allegations is the request that the court review the claimed contract to see if the plaintiff's contentions are borne out by the documents executed, admittedly, by both parties. Of course, on a motion to dismiss the complaint for failure to state a cause of action, it must be very clear that no relief can be granted under the facts alleged in the complaint (see Richardson v. Richardson, 58 AD2d 861) to support its dismissal. Here, the plaintiff has alleged a legally sufficient complaint for declaratory judgment of the rights between these parties.

Turning now to the defendant's and plaintiff's motions for summary judgment, the court is confronted with varying and inconsistent contentions by the parties to this lawsuit as to the translation, meaning and effect of the document aforedescribed, as well as the intent of the parties in executing the same. This is more properly treated in a plenary trial in which the respective claims may be weighed by the trial court after a full exposition of the subject matter. Thus the construction of the claimed agreement underlying this lawsuit would be an issue of fact to be resolved at such plenary trial. (Cf. Meathe v. State University Construction Fund, 65 AD 49, 52.) Since summary judgment has been described as the procedural equivalent to a trial, (Crowley's Milk Company v. Klein, 24 AD2d 920) it would be inappro-

priate at this juncture to resolve the controversy before this court on mere submissions.

Accordingly, the motion and cross-motion for summary judgment must be denied.

(Attorneys for plaintiff to submit one order in accordance herewith.)

Dated: Kingston, New York
December 3rd, 1980

APPENDIX D

ORDER OF SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM

At a Special Term, Part I of the Supreme Court, State of New York held in and for the County of Sullivan at the Sullivan County Courthouse on the 10th day of October, 1980.

PRESENT: Hon. Aaron E. Klein
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SUSAN ROE AVITZUR,

Plaintiff

-against-

BOAZ AVITZUR,

Defendant

ORDER

Index No. 211-81

The defendant havings moved for an Order pursuant to CPLR Section 3211(a) of the Civil Practice Law and Rules dismissing the action on the ground that plaintiff lacked the capacity to sue, that the necessary parties were not before the Corut, that the Court had no jurisdiction, and that the Complaint of plaintiff failed to state a cause of action and the plaintiff having cross moved for an Order pursuant to CPLR Section

3212(b) granting summary judgment and the motion and the cross motion having regularly come on to be heard,

NOW, upon reading and filing the notice of motion dated the 8th day of July, 1980 and the affirmation of Louis-Jack Pozner, Esq. with the exhibits annexed thereto dated the 8th day of July, 1980 in support of the motion and the notice of cross motion upon the affidavit of Susan Avitzur sworn to the 4th day of August, 1980, the affidavit of Mordecai Kieffer sworn to the 1st day of August, 1980 and the affirmation of Richard A. Hanft, Esq. dated the 7th day of August, 1980, and the exhibits annexed thereto in opposition to the motion and in support of the cross motion of the defendant and the affirmation in opposition to the cross motion by Louis-Jack Pozner, Esq. dated the 30th day of September, 1980 and the affidavit of Boaz Avitzur in opposition to the cross motion sworn to the 30th day of September, 1980 and the exhibits annexed thereto in opposition to the cross motion and said motion and cross motion

having come on to be heard and after hearing Louis-Jack Pozner, Esq., attorney for the defendant in support of the motion and Lee, LeForestier, Malone, Smith & Hanft, P.C., attorneys for plaintiff by Richard A. Hanft, Esq. of counsel in opposition thereto and upon hearing Lee, LeForestier, Malone, Smith & Hanft, P.C., by Richard A. Hanft, Esq. of counsel to plaintiff in support of the cross motion and Louis-Jack Pozner, Esq., attorney for the defendant in opposition thereto and due deliberation having been had and a decision of this Court having been made,

NOW, on motion of Lee, LeForestier, Malone, Smith & Hanft, P.C., by Richard A. Hanft, Esq. of counsel, attorneys for the plaintiff, it is

ORDERED, that the motion of the defendant be and the same hereby is denied and it is further

ORDERED, that the cross motion of plaintiff for summary judgment to CPLR 3212(b)

of the CPLR be and the same hereby is denied.

Dated: December 19, 1980
Kingston, NY

ENTER

s/ Aaron E. Klein
Justice of the Supreme Court

APPENDIX E

ORDER OF THE APPELLATE DIVISION, THIRD DEPARTMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York commencing on the 8th day of February, 1982.

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice
HON. MICHAEL E. SWEENEY
HON. T. PAUL KANE
HON. LEONARD A. WEISS
HON. HOWARD A. LEVINE,
Associate Justices.

SUSAN ROE AVITZUR,

Respondent,

-against-

BOAZ AVITZUR,

Appellant.

COUNTY CLERK'S INDEX NO. 211-81

BOAZ AVITZUR, having appealed from an order of the Supreme Court of Albany Count, entered on the 8th day of January, 1981, in the office of the Clerk of the County of Albany, and the appeal having been presented during the above stated term of this Court, and having been argued by Louis-Jack Pozner, Esq.,

of counsel for appellant, and Lee, LeForestier, Malone, Smith and Hanft, Richard A. Hanft, Esq. of counsel for the respondent, and after due deliberation, the Court having rendered a decision on April 8, 1982, Justice Howard A. Levine, dissenting, it is hereby

ORDERED, that the order of the Supreme Court of the State of New York (Hon. Aaron E. Klein, J.S.C.), is hereby modified on the law, by reversing so much thereof as denied the defendant/appellant's motion to dismiss the complaint and the motion is hereby granted and as so modified, the order of Special Term is affirmed, with costs.

E N T E R:

s/ John J. O'Brien
Clerk

Dated and Entered: April 21, 1982

SUPREME COURT, U.S.
FILED
SEP 8 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. 82-1854

BOAZ AVITZUR,

Petitioner,

v.

SUSAN ROE AVITZUR,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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September 1983

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No. 82 - 1854

BOAZ AVITZUR,

Petitioner,

v.

SUSAN ROE AVITZUR,

Respondent.

PETITIONER'S REPLY MEMORANDUM

Respondent mistakenly asserts that the Court does not have jurisdiction over this matter pursuant to 28 U.S.C. § 1257(3) because the order of the New York Court of Appeals is not a final judgment. However, respondent's purely technical argument ignores this Court's "pragmatic

approach" to determinations of finality within the meaning of § 1257 -- an approach which supports to review here. Shaffer v. Heitner, 433 U.S. 186, 195-96, n.12. (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

This Court will review orders of a state's highest court which are "plainly final on the federal issue and ... not subject to further review in the state courts" in cases where, as here, "there should be no trial at all" if the order is held erroneous. Cox Broadcasting Corp. v. Cohn, 420 U.S. at 485. Accordingly, in Cox, the Court held that it had the power, before trial on the merits, to decide whether a newspaper could even be sued for publishing the name of a rape victim. Similarly, in Shaffer, the Court reviewed the

constitutionality of quasi in rem jurisdiction, presented before trial on the merits.

Like Shaffer and Cox, this case presents a threshold constitutional question which goes to the right of the state court to entertain a claim at all. Petitioner contends that the First Amendment bars the New York courts from even considering the religious dispute between the parties. The constitutional harm is in the very adjudication of respondent's claim. Thus, though "the federal issue would be mooted if the petitioner ... prevailed on [nonfederal grounds] ... in the later state-court proceedings, ... there is nevertheless sufficient justification for immediate review of the federal question finally

determined in the state courts." Cox Broadcasting Corp. v. Cohn, 420 U.S. at 478-79.1/

None of the cases cited by Respondent comes within the "categories in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion ... of additional proceedings anticipated in the lower courts." Cox, 420 U.S. at 477. This Court declined review in Flynt v. Ohio, 451 U.S. 619 (1981) and San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) because additional federal questions remained to be determined on remand. 451 U.S. at 622; 450 U.S. at 633. In Costarelli v. Massachusetts, 421 U.S. 193 (1975); appellant had not sought review of the federal issue in the highest court of the state. In Minnick v. California Department of Corrections, 452 U.S. 105 (1981), an affirmative action case which came to the Court not long after its decision in University of California Regents v. Bakke, 438 U.S. 265 (1978), certiorari was dismissed "because of significant developments in the law ... and ... significant ambiguities in the record." 452 U.S. at 127. New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978) (White, J., in chambers) is completely inapposite; it involves an application for a stay before the filing of a petition for certiorari.

Moreover, if petitioner were to prevail on remand and make "unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision" of the New York Court of Appeals that the state courts may compel obedience to religious law and authority. Cox Broadcasting Corp. v. Cohn, 420 U.S. at 485. Whatever the result in this Court on the merits, "it would be intolerable to leave unanswered, under these circumstances, an important question ... under the First Amendment." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247 n. 6 (1974), Cox Broadcasting Corp. v. Cohn, 420 U.S. at 485-486.

The need for immediate review here is especially compelling in light of the fact that, since the petition for

certiorari was filed herein, New York has enacted a statute which requires litigants to prove that no religious bar to remarriage exists before a final judgment of civil divorce can be entered. Laws of 1983, Ch. 979. (A copy of the statute is submitted herewith as Appendix A.) The Governor's Memorandum approving the law, submitted herewith as Appendix B, makes clear that it was enacted to permit the state courts to force Jewish husbands "to give the wife ... a 'get'," purportedly solving "a problem created by the interrelation of Jewish law and New York Civil Law." (B2). The Governor candidly acknowledged constitutional objections to the law, but, noting the absence of a "single, clear, impelling precedent," nevertheless approved the bill and explicitly defered the constitu-

tional question to the courts. (B3-4) Although the constitutionality of the statute is not before the Court here, the Court can and should settle the constitutional question now. The maxim that "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,'" Cox Broadcasting Corp. v. Cohn, 420 U.S. at 477-478, quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945), applies not only to the dispute between the Avitzurs but to countless other New York litigants who

will be affected by the new statute. The Court should grant certiorari.

New York, New York
September 7, 1983

RESPECTFULLY SUBMITTED,

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APPENDIX A

Laws of the State of New York, 1983,
Ch. 979, Assembly Bill No. 6423-B

STATE OF NEW YORK

6423--B

1983-1984 Regular Session

IN ASSEMBLY

March 24, 1983

Introduced by M. of A. SILVER, M. H. MILLER - Multi-Sponsored by -- M. of A. BIANCHI, BRODSKY, DUGAN FELDMAN, FRIEDMAN, GOLDSTEIN, GOTTFRIED, GRIFFITH, HEVESI, HIKIND, JACOBS, LASHER, LIPSCHUTZ, MAYERSOHN, NADLER, NEWBURGER, SALAND, SANDERS, SIEGEL, STRAINERE, VITALIANO, WALDON, WEINSTEIN, YEVOLI -- read once and referred to the Committee on Judiciary -- amended on the special order of third reading, ordered reprinted as amended, retaining its place on the special order of third reading -- again amended on third reading, ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the domestic relations law, in relation to preventing parties to a marriage solemnized by a clergyman or minister which is concluded by annulment or divorce from establishing or maintaining barriers to remarriage

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The domestic relations law is amended by adding a new section two hundred fifty-three to read as follows:

§ 253. Removal of barriers to remarraige. 1. This section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in subdivision one of section eleven of this chapter.

2. Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint, that he or she has taken or will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce.

3. No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a verified statement that he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce.

4. In any action for divorce based on subdivisions five and six of section one hundred seventy of this chapter in which the defendant enters a general appearance and does not contest the requested relief, no final judgment of annulment or divorce shall be entered

unless both parties shall have filed and served verified statements that each has taken all steps solely within his or her power to remove all barriers to the other party's remarriage following the annulment or divorce.

5. As used in the verified statements prescribed by this section "barrier to remarriage" includes any religious or conscientious restraint or inhibition imposed on a party to a marriage, under the principles of the denomination of the clergyman or minister who has solemized the marriage, by reason of the other party's commission or withholding of any voluntary act. It shall not be deemed a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses. "All steps solely within his or her power" shall not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination.

6. No final judgment of annulment or divorce shall be entered, notwithstanding the filing of the plaintiff's verified statement prescribed by this section, if the clergyman or minister who has soleminized the marriage certifies, in a verified statement, that he or she

has solemnized the marriage and that, to his or her knowledge, the plaintiff has failed to take all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce, provided that the said clergyman or minister is alive and available to testify at the time when final judgment would be entered.

7. Any person who knowingly submits a false verified statement under this section shall be guilty of making an apparently sworn false statement in the first degree and shall be punished in accordance with section 210.40 of the penal law.

§ 2. This act shall take effect immediately.

APPENDIX B

Memorandum of the Governor of New York
filed with Assembly Bill No. 6423-B B1

TO THE LEGISLATURE:

MEMORANDUM filed with Assembly Bill Number 6423-B, entitled:

"AN ACT to amend the domestic relations law, in relation to preventing parties to a marriage solemnized by a clergyman or minister which is concluded by annulment or divorce from establishing or maintaining barriers to re-marriage"

CHAPTER 979
APPROVAL # 90

A P P R O V E D

The bill amends the Domestic Relations Law by adding a new section 253 to provide that any party to a marriage pending a divorce or annulment must allege in a verified complaint that the party has taken or will take prior to the entry of final judgment all steps to remove any barrier to the defendant's

remarriage following the annulment or divorce. The bill prohibits the entry of any annulment or judgment of divorce unless the plaintiff has filed such a statement.

The bill solves a problem created by the interrelation of Jewish law and New York Civil Law. Traditional Jewish law does not regard a secular divorce as sufficient to dissolve a marriage. It requires that the husband give the wife a document referred to as a "get".

This bill was overwhelmingly adopted by the State Legislature because it deals with a tragically unfair condition that is almost universally acknowledged.

The requirement of a get is used by unscrupulous spouses who avail themselves of our civil courts and simultaneously use their denial of a get vindictively or as a form of economic coercion.

Concedely, this use of our civil courts unfairly imposes upon one spouse, usually the wife, enormous anguish.

Some have urged that despite this, the bill before me should not be approved because it may be declared unconstitutional. There have been submitted to me arguments on both sides of the constitutional question but there is no single, clear, impelling precedent. If there were, I would defer to it.

Given the clarity of the need, the efficiency of this statutory solution and the uncertainty of the constitutional objection, I approve the measure.

If there is a constitutional impediment, I am sure our excellent courts will make that clear in due time.

The bill is approved.